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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1089

BATES BLOCK, *et al.*,

Petitioners,

versus

COMPAGNIE NATIONALE AIR FRANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COMPAGNIE NATIONALE AIR FRANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on January 19, 1968 upon decision rendered on November 8, 1967.

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[1] Additional petitioners are: Henry C. Berry; Ewing S. Humphreys; F. C. Terrell; John M. Luty; Ezekiel Samuel Candler; Fred H. Sorrow; Ralph J. Barry; Citizens & Southern National Bank; Trust Co. of Georgia; First National Bank at Winter Park; Hinton F. Longino; David C. Black; William King Self; Robert P. Turner, Jr.; Claire W. Morse; Sartain Lanier; Henry L. Bowden; James T. Anderson; Thomas G. Moore; Robert L. Gerson; William Eaton Merritt; Carroll Young Cargile; Tom-Chris Allen; Center C. Williamson; Jake Goldstein; Frank E. Loomis; Percy H. Perkins; Frank Virgin; First National Bank of Atlanta; Bank of Georgia; Fulton National Bank of Georgia; First National Bank of Georgia; and Rosa M. Baskett.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix C (A. 58a-118a)[2], has not, as of today, been reported. The opinion of the United States District Court for the Northern District of Georgia, printed in Appendix B (A. 32a-57a), is reported in 229 F. Supp. 801.

Jurisdiction

The decision of the Court of Appeals was rendered on November 8, 1967 (A. 119a-120a) and judgment entered on ~~January 29, 1968~~ that day. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Does the Warsaw Convention cover charter relationships?

2. Should a treaty which derogates and restricts private rights be "broadly construed" in accordance with French civil law principles so as to extend its application or should it be limited to the intent of its drafters?

3. Does the fact that a charter is arranged so as to resemble typical individual transportation serve to bring the charter under the Convention when the intent of the drafters was to place charters outside the scope of the Convention?

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[2] References designated "A." are to the appendix to this petition, which because it is voluminous, is separately presented. Sup. Ct. R. 23. References designated "R." are to the transcript of the record. References to exhibits filed by petitioners, below, on the motion for summary judgment will be made by the letters "SJX" followed by the number.

Treaty Involved

This case raises an issue involving the Warsaw Convention.[3] The full text in the English translation is printed as Appendix A. (A. 1a-31a).

Statement

Petitioners instituted 45 actions which were consolidated in the United States District Court for the Northern District of Georgia to recover damages for the wrongful deaths of sixty-two passengers in the crash of an airplane owned and operated by respondent Air France at Orly Airport, Paris on June 3, 1962. The destination of the fatal flight was Atlanta, Georgia (A. 58a). The aircraft had been chartered by the Atlanta Art Association from the respondent under a charter contract which provided that a Boeing 707 Intercontinental Jet Aircraft "shall be furnished to charterer" (Atlanta Art Association) for a flight from Atlanta to Paris and return at a cost of $36,000 (A. 58a). Petitioners are citizens of the State of Georgia and respondent is a French corporation with its principal place of business in France. Jurisdiction of the District Court is based on diversity of citizenship, 28 U.S.C. § 1332(a)(2).

Respondent Air France answered petitioners' complaints asserting three defenses, (1) that the flight was governed by the Warsaw Convention limiting recovery to a maximum of $8,291.87 for each person killed; (2) that the contract of carriage (as set forth in the Charter Flight Agreement or in the ticket or in both) incorporated by reference

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[3] Officially entitled "Convention for the Unification of Certain Rules Relating to International Transportation by Air," signed by representatives of 23 countries on October 12, 1929, adhered to by United States October 29, 1934, 49 U. S. Stat. at L. 3000-3026, p. 3014 (1935).

the Warsaw limitation; and (3) that the law of France where the accident occurred governed the case and under French law the Warsaw limitation was applicable. Petitioners filed a motion for partial summary judgment dismissing each of these defenses (R. 184). This motion was denied by the District Court (A. 32a-57a). The opinion of the District Court included a certification that the decision involved a controlling question of law concerning which there is substantial ground for difference of opinion and that an immediate appeal from this decision might materially advance the termination of the litigation (A. 57a). Petitioners' application for leave to appeal pursuant to 28 U.S.C. § 1292(b) was granted by the Court of Appeals for the Fifth Circuit on June 5, 1964 (R. 351).

Petitioners contended that the drafters of the Warsaw Convention did not intend to include charter flights within the Convention and that the question of chartering was deferred for further study and consideration in a future convention; that historical evidence demonstrated the drafters' intention to put the entire chartering question aside as one too complex and too premature to be considered within the limited scope of a first convention directed only to the normal individual contract of carriage; that the efforts of intergovernmental agencies subsequent to the signing of the Convention in 1929 demonstrated a continued interest in the question of chartering and that repeated efforts to formulate a convention, totally aside from the Warsaw Convention, to deal with chartering, gave rise to the clear inference that chartering had not been included within the Warsaw Convention.

Petitioners further argued that the conduct of the airlines in resorting to ticketing procedures for charter flights similar to those used in individual non-charter flight was an effort at artificial compliance with the terms of the Convention as well as a tacit admission by the airline enterprise that the Warsaw Convention did not include chartering.

Petitioners further contended that the drafters of the Warsaw Convention contemplated only the normal two party relationship based on a contract of carriage between the airline and the passenger and that this concern was reflected in the language and the structure of the Convention; that the language and the structure of the Convention as well as its history show that they intended not to cover any charter relationships; and that no amount of attempted artificial compliance by the airline with the appearance of traditional individual transportation would bring these charter relationships under the Convention.

Respondents on the other hand argued that the particular flight in question came within the terms of the convention; that the history of the Convention did not demonstrate an intention to exclude the entire issue of chartering from the Convention; that the Convention simply required a two party relationship which existed here, in that the Atlanta Art Association was either merely an agent for the members of the Association in negotiating the contract or that the Association was a mere nominal party which faded into "nothingness" after the contract was made.

Respondents initially argued that the Convention was clear and unambiguous and included all international transportation that met the geographical and ticketing requirements of the treaty. Later they took the position that charters wherein the charterer sold the space which he had obtained on the aircraft, which were referred to below as "European" type charters, were not included in the Convention.

The Court of Appeals affirmed the District Court in a two to one decision, with Judge Jones dissenting. The majority reasoned that the Warsaw Convention should be broadly construed to give it uniform application in accordance with the principles of French civil law (A. 68a-69a). Under this broad interpretation the court concluded that

some charters were within the scope of the Convention. The court reasoned that the nature of the relationship contemplated by the Convention between the operator and the passenger should be measured by civil law standards, and by civil law standards the requisite relationship existed in this case (A. 69a-77a).

Turning to the history of the Convention the court concluded that chartering was within the Convention, but the drafters left out of the Convention the determination of who the "carrier" was in a charter relationship (A. 90a-105a). In examining the history of the Convention the court suggested and perhaps even concluded that European type charters were not within the Convention but the charter in question was (A. 101a).

Having thus resolved the issue of the applicability of the Warsaw Convention the majority of the court did not consider the other defenses of French law and limitation by contract.

Judge Jones, in dissenting, first indicated that he would strike the defenses relating to French law and contract on grounds of public policy and choice of law. Turning to the Warsaw Convention defense he indicated his disagreement with the broad construction approach of the majority. He said that where, as here, the meaning of a treaty depends on construction, the meaning adopted should be that which is least restrictive of the rights of individuals and that which is consistent with a generally prevailing rule of public policy rather than one which should override it. He concluded that a treaty is to be construed in the light of the conditions and circumstances existing at the time of its drafting and they were such "as to make it improbable that charter flights were within the contemplation of those who made the treaty" (A. 116a-118a).

Reasons for Granting the Writ

1. This is an important question under an important treaty.

The issue of whether charters are within the Warsaw Convention is one of international importance. The Convention has been adhered to by more than ninety nations.[4] Its importance to the rights of American citizens is indicated by the fact that about half of the international passenger air travel is done by United States citizens.[5]

Air charters, the subject of this suit, constitute a large segment of international air travel. For example, over ten per cent of all air passengers traveling over the world's busiest travel route, the North Atlantic, fly on charter flights.[6] This is more than the total number of passengers carried by ships over the same route.[7] The prospect of international charter flying enlarging dramatically awaits the outcome of this Court's decision on the power of the Civil Aeronautics Board to authorize supplemental air carriers to carry inclusive tour charters.[8]

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[4] In *Air Carriers' Limitation of Liability and Air Passengers' Accident Compensation under the Warsaw Convention,* an article in 28 Journal of Air Law & Commerce 260 (1961-62), Peter H. Sand, the author, said "The 'Warsaw Convention' of 1929 is today the most widely accepted treaty on international commercial law." (p. 260) At that time the Convention was in force in 57 states; as of mid 1967, it was in force in 93 states.

[5] *The Warsaw Convention and the Washington Compromise, A View from America,* Andreas F. Lowenfeld, formerly Deputy Legal Adviser, U. S. Department of State, 10 Journal of the Royal Aeronautical Society 1061 (1966).

[6] *1966 World Air Transport Statistics,* International Air Transport Association, Montreal, Canada. In 1966, the total number of passenger crossings across the North Atlantic in chartered aircraft operated by members of I.A.T.A. was 502,896.

[7] New York Times, January 13, 1968. Article based on the *1966 World Air Transport Statistics* and statistics supplied by the Trans-Atlantic Passenger Steamship Conference.

[8] No. 800 World Airways v. Pan American World Airways, No. 949 Civil Aeronautics Board v. Pan American World Airways, No. 969 American Society of Travel Agents v. Pan American World Airways.

2. The case was improperly decided below.

The court below took over two and a half years to decide that the Convention applied to charter flights, and it did so by a divided vote. Circuit Judge Jones, dissenting, expressly concluded that the Convention does not apply under a contract of carriage on a voyage charter flight (A.116a-118a).

The case is admittedly one of first impression and not surprisingly, since the amount of relevant historical material presented was so imposing. This case itself consists of forty-five consolidated cases involving claims for wrongful death of sixty-two passengers.

Nevertheless, abandoning tenets of treaty construction well accepted and frequently propounded by this Court, the court below announced and followed "the primacy of the French legal system", which, admittedly, has a doctrinal basis different from that of United States law (A. 69a), to give "a broad construction" to the Warsaw Convention.

Without authorization in the treaty itself, or in any decision of this or any other court, and citing only a Swedish author who was concerned with the meaning of words rather than concepts of broad or strict construction of treaties, the court below said:

> "The binding meaning of the terms is the French legal meaning. 'The principle of the primacy of the French legal system thus means a harmonizing construction of the Convention.' This principle should not be carried to extremes, but '[u]niformity may be maintained without many futile disputes as to whether, why, and when resort to the teachings in Paris should be made.' The necessity for maintaining uniformity, even when the Convention is applied in a country, such as the United States, having a doctrinal basis for its legal system different from civilian systems, compels a broad construction of the Convention." (A. 69a)

Then, applying this "broad construction", the court below swept aside the plain impact of the Convention's history and the explicit intent of its drafters, and applied the Convention to charter relationships. Instead of considering whether the drafters of the Warsaw Convention intended to cover charter flights the court below examined the particular means employed by respondent, including the delivery of a standard form ticket, to create the appearance of a regular passenger contract of carriage. The court thereby abandoned the test of intent in favor of a test of artificial compliance. The court below added to the treaty what the drafters had taken out.

3. This Court is currently examining this treaty.

This Court already has before it a significant question of interpretation of the Warsaw Convention involving the same form ticket as was given by the airline herein to its passengers in an effort to demonstrate compliance with the ticketing requirements of the treaty, *Alitalia-Linee Aeree Italiane, S.p.A.* v. *Lisi*, No. 70.

While thus considering *Lisi* the court should also consider the parallel question of whether charter flights, which now constitute a significant part of international aviation come within the Convention at all.

4. The Court below has abandoned the tradtional test of treaty interpretation.

a. The proper test is legislative intent.

This Court has held that treaties should be construed to give effect to the intent of the drafters, *Factor* v. *Laubenheimer*, 290 U. S. 276 (1933); *Perkins* v. *Elg*, 307 U. S. 325, 337 (1939); *The Amiable Isabella*, 19 U. S. (6 Wheat.) 1 (1821).

In keeping with this principle, the courts, when interpreting the Warsaw Convention have turned to its his-

tory to ascertain this intent. *American Airlines* v. *Ulen*, 186 F. 2d 529 (D. C. Cir. 1949); *Pekelis* v. *Transcontinental and Western Air, Inc.*, 187 F. 2d 122 (2d Cir. 1950).

b. *The Court below inserted a casus omissus into the treaty.*

The Warsaw Convention does not mention charter relationships or charter flights, or charter agreements or charterers.

The historical material demonstrates a deliberate design on the part of the drafters, to leave the question of charters *out* of the Warsaw Convention, and to study it later with a view toward incorporation in a subsequent convention.

The court below has now, through "broad" construction, inserted a provision which would bring charter relationships into the Convention.

In doing so the court violated Mr. Justice Story's admonition in *The Amiable Isabella*, 19 U. S. (6 Wheat.) 1 (1821):

> "In the first place, *this Court does not possess any treaty-making power.* That power belongs by the constitution to another department of the Government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part a usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. *Neither can this Court supply a casus omissus in a treaty,* any more than in a law." (Emphasis supplied.) *Id.* at 71.

c. This is a private law treaty which restricts individual rights.

The Warsaw Convention affects only the rights and responsibilities of private individuals. Private law conventions, such as Warsaw, are basically different from public law conventions.[9]

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[9] As Renih Mankiewicz, of the Legal Bureau of ICAO pointed out in an article entitled "Air Law Conventions And The New States", 29 J. Air. L. & Com. 52, 62 (1963) states:

> "The only obligation which the former (a private law convention) imposes on a contracting state is to incorporate the substantive law rules of the convention into its own national law, either by merely ratifying the convention, or by enacting additional legislation when required by the constitutional law of the state concerned or by the convention itself. Once this obligation is complied with, there remains no further international duty for the contracting state arising out of a private law convention except to denounce the latter in the proper way if and when it is desired to modify or amend any national law based on the convention. Public law conventions, on the other hand, normally establish or entail permanent obligations to do, not to do, or to tolerate, certain acts during the lifetime of the convention."

Public international air treaties include The Pan American Convention on Commercial Aviation (47 U. S. Stat. at L. 1901) and The Sanitary Aerial Navigation Convention (49 U. S. Stat. at L. 3279) which impose upon the United States Government certain continuing obligations and responsibilities. In the Warsaw Convention the United States Government has no duties or responsibilities.

The distinction between public and private treaties has been recognized by this Court in *Haver* v. *Yaker*, 76 U. S. (9 Wall.) 32, 34 (1869).[10]

The courts have occasionally interpreted public treaties involving continuing obligations on the part of the contracting government "liberally", see *Factor* v. *Laubenheimer, supra;* and *Bacardi Corporation* v. *Domenech,* 311 U. S. 150 (1940). However, in private rights treaties, the integrity and good faith of the national government are not involved and a different situation is presented.

This Court, in the past, has refused to presume that a treaty intended to abrogate or modify rights unless the intent to do so is unmistakably indicated by direct and unambiguous language. *Perkins* v. *Elg,* 307 U. S. 325, 327 (1939); *Strother* v. *Lucas,* 37 U. S. (12 Pet.) 410 (1938).

In *Strother* v. *Lucas,* this Court said:

> "No construction of a treaty, which would impair that security to private property, which the laws and usages of nations would without express stipulation have conferred, would seem to be admissible further than its positive words require." Id. at 438.

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[10] This Court said:

> "It is undoubtedly true, as a principle of international law, that, as respects the rights of either *government* under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date. But a different rule prevails where the treaty operates on *individual* rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications . . ." (Emphasis supplied.) See also Charles Pergler, Judicial Interpretation of International Law 13 (MacMillian Co., 1928).

However worthy the intent of the drafters of the Warsaw Convention was and however well-meaning the intentions of our State Department and President when they recommended adherence, the Convention has turned out to be disastrous to the rights of American citizens. The Convention accomplishes nothing for them that they do not have anyway under the now accepted rule of *res ipsa loquitur*. It has even been held not to create a right of action, *Noel* v. *L.A.V.*, 247 F. 2d 677 (2d Cir. 1957), *cert. den.*, 355 U. S. 907 (1957), so that it does not even supply the arguable need for a right of action when an accident has happened in a place with no death law or obscure death law. Its limitation of damages for death of $8,300 is astonishing and unconscionable.

Carrier-imposed limitations of damages violate the public policy of most states of the United States, and, indeed were held to violate federal public policy; *New York Central Railroad Co.* v. *Lockwood*, 84 U. S. (17 Wall.) 357 (1873); *Curtis-Wright Flying Service, Inc.* v. *Glose*, 66 F. 2d 710 (3rd Cir. 1933), *cert. den.* 290 U. S. 696 (1933). The damages limitation of the Warsaw Convention, by its terms, only affects carriers, so that in a very real sense its obnoxious character falls squarely within the condemnation of numerous American public policy cases.

That the Warsaw Convention, with its arbitrary limitation on the common carrier's liability for negligence, represents a radical departure from American law and public policy was recognized in 1948 by the Civil Aeronautics Board which declared that the Convention was to be strictly construed and extended only by formal international agreement.

The C.A.B. said:

> "The rule establishing the invalidity of contracts which attempt to abrogate or limit the liability of a common carrier through the negligence of the carrier

is well established in the United States, . . . (citing authorities)" 10 CAB 783 (1949).[11]

The Board further stated:

> "To the extent that the proposed conditions of carriage would place a limit on liability in cases of non-Warsaw transportation, they represent a step away from the public policy of this country." 10 CAB 788 (1949).

The British Columbia Supreme Court, in 1961, held that the Warsaw Convention and the Carriage by Air Act (1952) R.S.C. Ch. 45, which ratified the Convention on behalf of Canada, were "not dissimiliar to a taxation statute" and "were to be strictly construed, rather than liberally", and therefore held the Convention not applicable. *Stratton* v. *Trans Canada Air Lines*, 7 Avi. Cas. 17,724 (Br. Col. S. Ct. 1961).

That our courts should give a strict construction to treaties violative of private rights and inconsonant with our public policy was recognized by Circuit Judge Jones in his dissent below (A. 118a):

> "If alternative meanings can be placed upon a treaty, the one adopted should, if possible, be that which is least restrictive of the rights of individuals. *Universal Adjustment Corporation* v. *Midland Bank, supra.* The rule that invalidates contract provisions which restrict the rights of passengers to recover for personal injuries is one generally prevailing in the United States. 13 C.J.S. 1182, Carriers § 629. The rule is founded upon public policy. *Aetna Casualty & Surety Co.* v. *Prather*, 59 Ga. App. 797, 2 S. E. 2d 115;

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[11] The views expressed by the CAB, the national agency responsible for air transportation in this country, are entitled to careful consideration by the courts. *Kolovrat* v. *Oregon*, 366 U. S. 187 (1961).

Philippine Air Lines, Inc. v. *Texas Engineering & Manufacturing Co., Inc.*, 5th Cir. 1950, 181 F. 2d 923. Where the meaning of a treaty depends upon construction, as I think is the case here, the meaning adopted should be that which is consistent with a generally prevailing rule of public policy rather than one which should override it."

d. ***The abandonment of our own standards of treaty interpretation in favor of a French law approach was unwarranted.***

In articulating "the primacy of the French legal system" and in finding that this "compels a broad construction of the Convention" the majority of the court below drew attention to Article 36 (A. 22a) of the Convention (A. 69a).

But Article 36 only refers to the language in which the original was to be filed! Nowhere in the Convention is there a provision to the effect that principles of treaty interpretation shall be those followed by French law. Nowhere is there a suggestion that an American court could abdicate its concern for legislative intent and restriction of private rights in favor of the "broad" or "liberal" approach prescribed by French law.[12]

Yet on that basis the court below downgraded the strong evidence of the drafters' intent (e.g. Beaumont said certain delegates to the Warsaw Conference said "the Government draftsmen responsible for the Warsaw Convention did not contemplate charter contracts coming within the provisions of the Convention at all . . .") (A. 94a) in favor of conclusory opinions (including Beaumont's) that the re-

[12] Even Sundberg, the Swedish author relied on by the majority below (A. 69a) was only concerned with the primacy of the French text in resolving *language* differences concerning the meaning of the terms used in the treaty. Nowhere does Sundberg suggest that basic American law concepts of *casus omissus* and legislative intent be abandoned.

lationship between the passengers and Air France *should* come within the Warsaw Convention (A. 97a, 105a-110a).[13]

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[13] The majority opinion below recognizes that there were three sets of contractual relationships involved herein rather than the single, individual passenger relationship contemplated by the drafters of the Convention (A. 70a-80a). But then the majority shifting from legislative intent to broad construction says:

> "The contractual relationship established between Air France and the passengers and evidenced by the individual issuance of these tickets fits the description of the relationship required by the Warsaw Convention." (A. 80a)

Similarly, the majority cites the conclusions of several commentators. Examination of their statements and conclusions reveals recognition by them that the drafters of the Convention intended not to cover charters.

For example, Abrosini (A. 106a) said that the Brazilian proposal at the Warsaw Conference was designed "In order to know if the Convention would be able to be applicable in the case of chartering." Fletamento Y Transporte, Aeronautica Argentina, IDAN/9 p. 3 (Buenas Aires, 1951), cited by Sundberg, *Air Charter* 201 (1961).

Coquoz, author of *Le Droit Prive International Aerien* (Paris, 1938) is another commentator relied on by the majority below (A. 109a-110a). Yet in his book Coquoz said:

> "On the other hand, the acts of CITEJA and of the Conference reveal to us clearly enough that the Convention authors did not intend to regulate chartering." (*Id.* at 93)

It is true that Coquoz went on to say:

> "This does not prevent the Convention from being applicable if the text permits it." (*Id.* at 93)

But this simply illustrates how a French lawyer using a civil law approach might disregard legislative intent in drafting a treaty and yet apply that treaty to a given set of circumstances. Whereas the standard of treaty interpretation under our law is clearly the intent of the parties in entering into the treaty the standard under civil law is far more subjective. See, for example, Article I of the Swiss Civil Code, Von Mehren *The Civil Law System*, 828, 829 (1957), Ballot Beaupre, Le Centenaire du Code Civil (1904), at 27, cited in Von Mehren, *The Civil Law System*, 828, fn. 24 (1957).

5. The legislative history of the Warsaw Convention as well as its language, makes it clear that the drafters did not intend to cover any charter relationships including the type involved herein.

A wealth of historical data is available and will be presented to the Court, if the writ of certiorari is granted, demonstrating that the drafters of the Convention did not intend to cover any charter flights including voyage charter flights of the type involved herein. We recognize that this is not the place to spell out this historical material, but a few highlights are appropriate to demonstrate that the majority of the court below was wrong in its conclusion "that the history of the Convention, before and after Warsaw, shows that the Warsaw Convention applies to a voyage charter flight" (A. 105a), and that the conclusion of Judge Jones, dissenting, was correct that it is "improbable that charter flights were within the contemplation of those who made the treaty" (A. 117a).

A. The continuing study by CITEJA of the charter question before and after the signing of the Convention.

The preparatory work for the Warsaw Convention was done by CITEJA (officially translated as "International Technical Committee of Aerial Legal Experts")[14] CITEJA was created by the First International Conference on Private Air Law in Paris, in 1925. The work of CITEJA resulted in the Warsaw Conference of 1929, which created the Warsaw Convention, but the work of CITEJA continued until 1946.

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[14] National Archives, Department of State Decimal File 1910-29, File No. 579.6L1/24. Hereafter, such files will be referred to in the style: "Archives 579.6L1/24". All such files are from the general records of the United States Department of State and may be examined in the National Archives, Washington, D. C.

The 1925 Paris Conference prepared a preliminary draft of a Convention on the Liability of Air Carriers. It also assigned to CITEJA, for study, the question of "Location d'aeronéf".[15] As pointed out by the court below this term included chartering of aircraft (A. 63a).

In 1926 "Location des aeronéf" was assigned to CITEJA's Second Commission (committee).[16] At a meeting of this Commission, before the Warsaw Conference in May, 1929, DeVos, the Reporter in charge of drafting a proposed convention indicated that chartering of aircraft was not of practical interest for an international convention; that it might become of interest in the future; and that it might be advisable to appoint a reporter on that subject.[17] The President of this Commission, Arendt, concluded that "the question of hiring of aircraft will be examined subsequently."[18]

"Location des aeronéf" remained on the agenda of the Second Commission beyond the Warsaw Conference, through 1946.[18a] CITEJA itself considered the charter question again in 1932, three years after the Warsaw Convention had been signed.

The continued study of the question after the Warsaw Conference had ended is evidence that the question of chartering was not settled in the Convention.

B. The Brazilian proposal.

At the Warsaw Conference itself, in 1929, the question of dealing with chartering was specifically raised and was specifically deferred for later consideration in another convention. It was raised in the form of a proposal made

[15] Archives 579.6L1A/22½.

[16] Archives 579.6L1/24.

[17] Archives 579.6L1A/84, CITEJA Document 4, pages 4-5.

[18] Id. page 8.

[18a] ICAO Document 4003, pp. 67-75.

by the Brazilian delegation, and it was one of four proposed amendments singled out and specified in the "Final Protocol" of the Conference, a formal document signed by all of the delegates present.[19]

The Brazilian delegation pointed out that the draft of the Convention used the word "carrier" which was clear in transportation afforded an individual passenger in accordance with the normal contract of carriage, but which in a three-party charter relationship was ambiguous. The Brazilians pointed out that with charter relationships under some systems of law the owner would be the carrier and under other systems of law the charterer would be considered the carrier.

To cover charters and eliminate the ambiguity the Brazilians suggested a clause defining the word "carrier" to include both owner and charterer in a charter situation.[20] The delegates, including DeVos, were not ready to extend the coverage of the Convention to charter relationships. They wanted to limit themselves to "certain unification rules"; to taking a *first step.* This is apparent from the floor discussion and the specific terms of the Final Protocol, which stated "that the Warsaw Convention only regulates certain questions", . . . "that international air navigation is raising many other questions which it would be desirable to regulate by international understanding;"[21] . . . "that the Warsaw Conference, having taken cognizance of the Brazilian proposal, believing that the question should not be settled in this convention, refers the proposal to CITEJA. . . ."[22]

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[19] See the Minutes of the Conference, English translation, SJX 6, page 401.

[20] SJX 6, page 241.

[21] SJX 6, pages 216-217; State Department Bulletin of Treaty Information #7, Archives 579.6L2/73, pages 28-29.

[22] Ibid.

The Final Protocol, which is the best possible proof of legislative intent, in fact does no more than echo the Minutes of the Conference itself. Speaking from the floor of the Conference Giannini, the Chief of the Italian Delegation, and the Chairman of both the Preparatory Commission and the Drafting Committee, said:

> "With regard to this proposal from Brazil, the Committee was of the opinion that *this problem does not fall under this convention.* . . . the codification of private air law takes place progressively, we are forced to anticipate somewhat and we have contemplated certain problems which affect other conventions. However, as *in this case* it was not necessary to define the 'transporteur' (carrier), . . . we have submitted his proposal to the CITEJA so that it be taken into consideration." (Emphasis supplied.)[23]

Giannini's statement that "this problem does not fall under this Convention . . . in this case it was not necessary to define the carrier" can only mean that in the case of the normal, non-charter relationship there is no question as to the identity of the "carrier". This shows that the Convention is limited to that relationship.

DeVos, who is called the primary author of the Convention by the majority of the court below (A. 93a), referred to the Brazilian proposal on the floor of the Conference. As the floor leader, attempting to push through the legislation with the minimum of changes, he thanked the delegates who had presented amendments and who had withdrawn them "not because they were not justified, but because they were outside the framework of the Convention which limits itself to certain unification rules. . . ."[24] He added "certain amendments appear to us to be justified and very reasonable . . . but mostly for the future work of

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[23] Unofficial translations contained in SJX 4, p. 2, and SJX 6, p. 235.

[24] SJX 6, p. 237.

the CITEJA. Thus, it was the case for some of the amendments presented by the Brazilian delegation,"[25]

Ambrosini, Coquoz, and Drion, all of whom were cited by the majority of the court below, all agreed that the purpose of the Brazilian proposal was to include charters within the Warsaw Convention.[26]

Even apart from its specific reference to the Brazilian proposal the Final Protocol indicates that the Convention deals only with non-charter transportation. Section "B" of the Final Protocol recognized that there were other types of air transportation, which certainly included charter transportation, that should be dealt with in other conventions. Otherwise "B" has no meaning. It provided:[27]

> "B. The Conference, considering the importance from an international standpoint of uniform regulations for transportations by air of every kind,
>
> Recommends
>
> that the International Technical Committee of Aerial Legal Experts prepare a preliminary draft convention on the subject as soon as possible."

---

[25] Id. at 238. The defendant below, suggested that in rejecting the Brazilian proposal and in deferring the question for further consideration by CITEJA in another convention, the conference intended to defer questions relating to some types of charters but not the type of voyage charter involved herein. The defendant has ignored the fact that the Brazilian proposal was directed primarily, if not entirely, at voyage charters. Time charters and bare hull charters could not come within the Convention anyway, by virtue of Article 1(2) which required a contract of carriage specifying places of departure, destination, and stops that meet certain geographical requirements. (Vaicoussis, a paper on the liability of the aircraft operator and charterer 12 n. 7 [McGill University 1952], contained in SJX 11.) The Brazilian proposal would not have brought them under the Warsaw Convention. It would have brought voyage charters under the Warsaw Convention.

[26] See n. 13, *supra*, and Drion, Limitation of Liability in International Air Law 133 (1954).

[27] Archives 579.6L2/73, pp. 28-29 containing State Department Bulletin of Treaty Information No. 7, Supplement of October 12, 1929.

C. The delegates to the Warsaw Conference intended to take a limited step.

The Minutes of the Warsaw Conference emphasize and re-emphasize the intention of the delegates to take a limited first step toward what they thought would be "the progressive elaboration of a comprehensive code of private international air law".

Lutostanski, the President of the Conference, in his opening speech said:[28]

> "The questions contained in the draft we have before us are but the beginning, the first fruit of the program undertaken in Paris in 1925, outlined and then executed by the CITEJA." * * * "Your President will be happy if the work of this Warsaw Conference becomes the springboard for a series of conventions on private air law . . ."

DeVos, the Rapporteur of the draft convention in his report to the Conference asked the delegates to:[29]

> ". . . hasten the ratification of this first international law, which shall be the beginning of the Air Code."

Giannini, in his initial report to the Conference, as Chairman of the Preparatory Commission said:[30]

> ". . . we are making a first effort and we must be happy to do it."

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[28] SJX 6, pp. 11-12.

[29] SJX 6, p. 26.

[30] SJX 6, pp. 38-39.

He added:

"[W]e shall propose the following title for the Convention:

" 'Convention relating to certain rules on the unification on private air law.'

. . . the title indicates the particular character of the Convention. . . ."[31]

In connection with the formulation of the Final Protocol, Ripert, the Delegate of France, proposed the following 'wish':

"The Conference,

'Considering that the Warsaw Convention only settles certain difficulties relating to air transportation and that international air transportation raises many other questions which should be settled by international agreement.

'Wishes:

'That, through the French Government which took the initiative of calling these Conferences, new conferences should be called subsequently to pursue this task of unification."[32]

When the United States adhered to the Warsaw Convention in 1934 it knew of the Brazilian proposal, the action taken on it, and the limited scope of the Warsaw Convention.

The United States had two qualified observers at the Warsaw Conference. Furthermore, multiple copies of the detailed Conference Minutes, containing the Brazilian Proposal and the discussion of it on the floor were received by the State Department and widely distributed among its divisions and other departments of our Government.[33]

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[31] SJX 6, p. 305.
[32] SJX 6, p. 312.
[33] See, Archives 579.6L2/52, 68, 78, and 80.

In addition, numerous copies of the Final Protocol were received both in separate form and annexed to CITEJA publications on the Warsaw Convention.[34]

In addition there is a wealth of evidence from State Department files demonstrating our Government's belief that the Warsaw Convention was but the first of what were to be additional conventions on air law. These include Presidential messages to Congress as well as letters from State Department officials including the Secretary of State.[35]

D. The IATA Questionnaire

Major Beaumont, the representative of the International Air Traffic Association at the Warsaw Conference, and a member of its Legal Committee, in 1932 presented a report to IATA.[36]

Beaumont had attempted to review with a representative group of delegates to the Warsaw Conference the question of whether the Conference had intended to cover

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[34] See, Archives 579.6L2/36, 37, and 39.

[35] See, Archives 579.6L1A/114½, containing Senate Document #121, 71st Congress, 2d Sess. (1930); Archives 579.6L1A/148, S. Rep. No. 1404, 71st Congress, 3d Sess. (1931); Archives 579.6L1A/242, H. R. Rep. No. 800, 72nd Cong. 1st Sess. (1932); Archives 579.6L1A/145:

> "The delegates to the Warsaw Conference stated that as international air navigation is raising many other questions which it would be desirable to regulate by international understandings they recommended that other Conferences be called to continue the work of unification of private aerial law. When it is considered that there will probably be separate conventions on various other phases of private aerial law, the magnitude of the work undertaken by the International Technical Committee of Aerial Legal Experts will be readily appreciated." *Id.* at 3.

[36] 17 IATA Inf. Bull. 42 (Hague 1932). See the report of this bulletin in Sundberg, *Air Charter*, 201 (1961).

charters in the Warsaw Convention. His report indicates that the drafters did not contemplate charters coming within the provisions of the Convention at all. The report says, in part:

> "The replies received to these enquiries in the first instance seemed to indicate that the Government draftsmen responsible for the Warsaw Convention did not contemplate charter contracts coming within the provisions of the Convention at all, . . ."[37]

IATA, reflecting Beaumont's observations, evinced considerable concern about whether or not the Warsaw Convention covered charter flights, and, particularly, voyage charters.

In a questionnaire directed to CITEJA,[38] IATA expressed its belief that the Warsaw Convention had not "taken into consideration" charters or hire of aircraft, raised questions about the legal relationships involved in these contracts, and asked CITEJA "*whether it would not be desirable to prepare a special international convention . . . on contracts of charter* and lease of aircraft, in order to settle and make clear the questions giving rise to *doubt* . . . (particularly in the cases mentioned in the above questionnaire)" (Emphasis supplied.)

In his Report to IATA to which the questionnaire was attached Beaumont said:

> "The position is this: the *Convention of Warsaw has not taken into consideration special charters* or hiring of aircraft to people under various circumstances *and therefore even my valued colleagues . . . and all the*

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[37] Quoted from Sundberg, *Air Charter*, n. 59, p. 201.

[38] Archives 579.6L1A/339, 344.

. government lawyers whom we have consulted did not really know what the legal position is concerning these contracts.'' (Emphasis supplied.)[39]

Thus the airlines themselves and their expert, Beaumont, who attended the Warsaw Convention as their representative, knew that the Warsaw Convention had not taken charters into consideration.

The majority of the court below takes the view that the ''post-Warsaw meetings show a concern, similar to that expressed by the Brazilian delegation, as to whether charterers, not charter *flights* are covered by the convention'' (A. 93a). This is plainly rebutted by the IATA questionnaire and its Decision #8, and the great concern indicated therein that the whole field of chartering was not dealt with in the Convention. The airlines' position in charter relationships such as the one at bar was as owner, and not as charterer, and the ''urgent necessity'' referred to related to their liability, because of a fear that charter relationships were not covered at all.[40]

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[39] On September 27 and 28, 1933, only six months before President Roosevelt sent the Warsaw Convention to the Senate for advice and consent to adherence, the International Air Traffic Association met in London and made the following decision:

> "Decision #8.—*The Warsaw Convention and special charter contracts.* In order to cure the difficulties experienced by air carriers and their clientele, under the regime of the Warsaw Convention concerning charter contracts and leasing of aircraft, the members of IATA are asked to point out to their governments the *urgent necessity of establishing an international convention treating exclusively with this matter.*" (Emphasis supplied.) (Archives 579.6L1A/444, pp. 18-19.)

[40] In making that distinction the court below also overlooked many statements in the historical record which clearly indicate that the whole subject matter of charters had not been covered by the Warsaw Convention. For example, Giannini, in 1933 stated that the "question consisted in seeing whether charter-parties should be introduced in air law. . . ." (Archives 579.6L1A/382; CITEJA Doc. 197).

E. Cogliolo's conclusions.

The great concern of the airlines that charter relationships were not covered by the Warsaw Convention was referred in 1933 to CITEJA for study. The matter was referred to Professor Cogliolo of Italy who was appointed Reporter on the charter question, for CITEJA's Second Commission. Cogliolo had been active in CITEJA from its very beginning.[41]

Cogliolo carefully considered the IATA questionnaire and the entire subject of charters. He filed two reports, one in 1936 and one in 1937, which leave no doubt whatsoever but that in his view, as the responsible Reporter on the question, voyage charter flights, of the kind involved herein were not covered by the Warsaw Convention.

The majority opinion of the court below discussed Cogliolo and took a very narrow and selective view of the plain import of his written reports. Indeed the court relied on a section of his report that did not relate at all to a passenger voyage charter (A. 99a-100a), but related to a shipper of goods who instead of shipping in the usual way rented a given space in the aircraft. The Warsaw Convention covers the shipment of goods as well as the transportation of passengers and in this situation, *which is not a charter at all,* and which bears no resemblance to the situation at bar, Cogliolo concluded that the Convention applies. But in the charter situation, including the voyage charter situation, Cogliolo concluded, clearly and specifically, that "the Warsaw Convention cannot be applied" unless it was to be amended.[42]

It is important to note that the statements made by DeVos, in the course of these CITEJA discussions, sug-

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[41] Archives 579.6L1/24; 579.6L1A/60.

[42] Archives 579.6L1A/1302; CITEJA Doc. 328, May 1937; SJX 12. See the Opinion of the majority of the court, below, where in footnote 56 the court quotes some of the relevant sections (A. 100a-101a).

gesting that the Warsaw Convention did apply to charters, which were relied upon by the court below, were rejected by Cogliolo in his report on the question (A. 98a-100a).

As pointed out by the majority of the court below the first five conclusions in Cogliolo's 1937 report, which clearly demonstrate that the Warsaw Convention does not apply to charters, impelled the defendant to contend that they related only to a type of voyage charter known in Europe, and referred to by the court as "European charters where the charterer is not the passenger but may issue tickets to third parties in his own name, i.e. the charterer contracts with the passengers to transport them" (A. 101a).

It is true that the defendant, below, did so argue, and did attempt to demonstrate a distinction between the "European charters" and the type it said was involved herein. In doing so the defendant, of course, implicitly admitted that the Warsaw Convention did not apply to these "European charters" and thus that it did not apply to "all international transportation", as it had originally contended.

The point is interesting for several reasons. First the so-called "European charter" may be extensively used in the United States if this Court upholds recent Civil Aeronautics Board orders. But more important the court below, demonstrated its failure to apply the proper standard of treaty interpretation—the intent of the drafters. The drafters chose not to get involved in distinctions between types of charters, but to defer such questions for a later convention. Finally the position of the defendant in the court below demonstrates that to sustain the application of the Warsaw Convention to a voyage charter of the type involved herein a court must construe the charterer, in this case the Atlanta Art Association, into a position of non-existence.

F. The six efforts to draft a new convention relating to charters.

Following the deliberations of CITEJA's Second Commission and Professor Cogliolo's two reports no less than six serious efforts were made by CITEJA, its Rapporteurs, or its successor, the Legal Committee of the International Civil Aviation Organization, to formulate a convention that would deal with charter relationships.[43]

These efforts resulted in draft conventions spelling out the liability of the airline to the passenger in a voyage charter of the kind involved herein. These efforts are not seriously considered in the majority opinion, below, but they raise an obvious question. Why were six official efforts made to formulate such a convention if the Warsaw Convention already specified this liability?

The majority opinion below virtually skips these efforts and proceeds to a consideration of the International Conference at the Hague in 1955 which produced the Hague Protocol (A. 101a-102a). Even here the majority opinion ignores the plain impact of the historical record. The question of charters came up at the Hague Conference, but again it was deferred.

The "Final Act" of the Hague Conference provided:

> "THE CONFERENCE
>
> HAVING CONSIDERED the report of the Sub-Committee of the Legal Committee of the International Civil Aviation Organization on the charter and hire of aircraft,

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[43] Archives 579.6L1A/1655, 1814; CITEJA Doc. 423, p. 2, contained in SJX 9; Sundberg, *Air Charter* 388 (1961); Reemts, *Charter, Hire and Interchange of Aircraft* 10 (McGill 1956), contained in SJX 11; CITEJA Doc. 445 contained in ICAO Doc. 4003 at pp. 29-66, SJX 13; ICAO Doc. 4003, pp. 67-75, SJX 13; ICAO Doc. 6024-LC/121, SJX 14; ICAO Doc. 7229-LC/133, p. 197, SJX 14.

AND BEING OF THE OPINION that the matter is of too great complexity to permit the insertion of provisions relating thereto in the Protocol to amend the Warsaw Convention,

BUT CONSIDERING that the matter is of considerable practical importance in view of the extent of charter and hire arrangements and requires further study,

RECOMMENDS to the International Civil Aviation Organization that this subject should be further studied by this organization.'"[44]

G. The language and structure of the treaty.

The foregoing consideration of history, both before and after the enactment of the Warsaw Convention supplements the significance of the language of the treaty itself. A fair reading of the entire Warsaw Convention demonstrates that it was exclusively concerned with unifying certain rules in normal, individual passenger travel. The Convention turns not on flights or travel, but on the traditional definite contract of carriage between passenger and carrier. The only two parties mentioned are the airline and the passenger and the only contract mentioned is the one between them. Charterers are not mentioned; nor are charter contracts or charter flights.

Furthermore, the structure of the convention is in terms of two parties and a two party relationship and a single definite contract, whereas, even as stated in the majority opinion below, a charter arrangement, including the particular one involved herein, involves three parties, the owner of the aircraft, the charterer, and the passenger. Furthermore, it involves at least two contracts, the one between the owner and the charterer, and one between the charterer and the passenger.

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[44] ICAO Document 7686, pp. 19-32, SJX 14.

Conclusion

A divided Court of Appeals after a two and a half year consideration of the question evolved an erroneous interpretation of an important question under an important international treaty in which the United States has a great interest. The case itself involves sixty-two deaths. The amount of charter flying has rapidly increased until it is now a substantial part of all international air travel. Depending on questions now before this Court the amount of air charter transportation may increase even further. This court now has this same treaty under consideration on a question that is not unrelated to the question herein. The court should grant this petition for a writ of certiorari and review the determination by the court below that the Warsaw Convention covers charter flights.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1089

BATES BLOCK, *et al.*,
Petitioners,

vs.

COMPAGNIE NATIONALE AIR FRANCE,
Respondent.

Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 RE 2-6978—1968

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APPENDIX A.

49 U. S. Stat. at L. 3000, 3014.

Translation

Multilateral Convention relating to international air transportation.

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR

Contracting Powers.

The President of the German Reich, the Federal President of the Republic of Austria, His Majesty the King of the Belgians, the President of the United States of Brazil, His Majesty the King of the Bulgarians, the President of the Nationalist Government of China, His Majesty the King of Denmark and Iceland, His Majesty the King of Egypt, His Majesty the King of Spain, the Chief of State of the Republic of Estonia, the President of the Republic of Finland, the President of the French Republic, His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India, the President of the Hellenic Republic, His Most Serene Highness the Regent of the Kingdom of Hungary, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Latvia, Her Royal Highness the Grand Duchess of Luxemburg, the President of the United Mexican States, His Majesty the King of Norway, Her Majesty the Queen of the Netherlands, the President of the Republic of Poland, His Majesty the King of Ru-

mania, His Majesty the King of Sweden, the Swiss Federal Council, the President of the Czechoslovak Republic, the Central Executive Committee of the Union of Soviet Socialist Republics, the President of the United States of Venezuela, His Majesty the King of Yugoslavia:

Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier,

Have nominated to this end their respective Plenipotentiaries, who, being thereto duly authorized, have concluded and signed the following convention:

Chapter I. Scope—Definitions

Article 1

Scope.

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

Definitions.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory

of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

Article 2

Application of convention.

(1) This convention shall apply to transportation performed by the state or by legal entities constituted under public law provided it falls within the conditions laid down in article 1.

(2) This convention shall not apply to transportation performed under the terms of any international postal convention.

Appendix A

Transportation documents.

Chapter II. Transportation Documents

Section I.—Passenger Ticket

Article 3

Passenger ticket.

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail him-

self of those provisions of this convention which exclude or limit his liability.

Section II.—Baggage Check

Article 4

Baggage check.

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The name and address of the carrier or carriers;

(d) The number of the passenger ticket;

(e) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(f) The number and weight of the packages;

(g) The amount of the value declared in accordance with article 22(2);

(h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

Section III.—Air Waybill

Article 5

Air waybill.

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air waybill"; every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity, or loss of this document shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of article 9, be none the less governed by the rules of this convention.

Appendix A

Article 6

Requirements.

(1) The air waybill shall be made out by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handled by him to the consignor after the goods have been accepted.

(3) The carrier shall sign on acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7

The carrier of goods has the right to require the consignor to make out separate waybills when there is more than one package.

Article 8

Contents.

The air waybill shall contain the following particulars:

Appendix A

(a) The place and date of its execution;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transporation of its international character;

(d) The name and address of the consignor;

(e) The name and address of the first carrier;

(f) The name and address of the consignee, if the case so requires;

(g) The nature of the goods;

(h) The number of packages, the method of packing, and the particular marks or numbers upon them;

(i) The weight, the quantity, the volume, or dimensions of the goods;

(j) The apparent condition of the goods and of the packing;

(k) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(l) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(m) The amount of the value declared in accordance with article 22 (2);

Appendix A

(n) The number of parts of the air waybill;

(o) The documents handed to the carrier to accompany the air waybill;

(p) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(q) A statement that the transportation is subject to the rules relating to liability established by this convention.

Article 9

Liabilities.

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8 (a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

Article 10

Responsibility for correctness.

(1) The consignor shall be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill.

(2) The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

Appendix A

Article 11

Prima facie evidence of contract.

(1) The air waybill shall be *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportation.

(2) The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of packages, shall be *prima facie* evidence of the facts stated; those relating to the quantity, volume, and condition of the goods shall not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

Article 12

Consignor's right to dispose of goods.

(1) Subject to his liability to carry out all his obligations under the contract of transportation, the consignor shall have the right to dispose of the goods by withdrawing them at the airport of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination, or in the course of the journey to a person other than the consignee named in the air waybill, or by requiring them to be returned to the airport of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors, and he must repay any expenses occasioned by the exercise of this right.

Appendix A

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air waybill delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill.

(4) The right conferred on the consignor shall cease at the moment when that of the consignee begins in accordance with article 13, below. Nevertheless, if the consignee declines to accept the waybill or the goods, or if he cannot be communicated with, the consignor shall resume his right of disposition.

Article 13

Delivery of goods and waybill.

(1) Except in the circumstances set out in the preceding article, the consignee shall be entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the goods to him on payment of the charges due and on complying with the conditions of transportation set out in the air waybill.

(2) Unless it is otherwise agreed, it shall be the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days

after the date on which they ought to have arrived, the consignee shall be entitled to put into force against the carrier the rights which flow from the contract of transportation.

Article 14

Enforcement of respective rights.

The consignor and the consignee can respectively enforce all the rights given them by articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

Article 15

Respective relationship.

(1) Articles 12, 13, and 14 shall not affect either the relations of the consignor and the consignee with each other or the relations of third parties whose rights are derived either from the consignor or from the consignee.

Variations in waybill.

(2) The provisions of articles 12, 13, and 14 can only be varied by express provision in the air waybill.

Article 16

Customs, etc., formalities.

(1) The consignor must furnish such information and attach to the air waybill such documents as are necessary to meet the formalities of customs, octroi, or police before

the goods can be delivered to the consignee. The consignor shall be liable to the carrier for any damage occasioned by the absence, insufficiency, or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

(2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

Liability of carrier.

Chapter III. Liability of the Carrier

Article 17

Personal injuries, etc.

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18

Checked baggage, etc.

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during

which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Article 19

Transportation delay.

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

Article 20

Exemptions.

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Appendix A

Article 21

Contributory negligence.

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22

Maximum liability.

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

Appendix A

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65 1-2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 23

Provision for relieving, etc., liability void.

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Article 24

Actions for certain damages.

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Appendix A

Article 25

Carrier's wilful misconduct.

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Article 26

Evidence of delivery in good condition.

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

In case of damage.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

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Complaints in writing.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Article 27

Liability of estate of deceased person.

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this convention against those legally representing his estate.

Article 28

Venue of action.

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

Procedure.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Appendix A

Article 29

Time limitation.

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

Article 30

Transportation by successive carriers.

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

Chapter IV. Provisions Relating to Combined Transportation

Combined transportation.

Article 31

Provisions relating to.

(1) In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of article 1.

(2) Nothing in this convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of this convention are observed as regards the transportation by air.

Chapter V. General and Final Provisions

Appendix A

Article 32

General, etc., provisions.

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28.

Article 33

Rights of carriers to refuse, etc.

Nothing contained in this convention shall prevent the carrier either from refusing to enter in any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

Article 34

Transportation excluded from application of convention.

This convention shall not apply to international transportation by air performed by way of experimental trial by air navigation enterprises with the view to the establishment of regular lines of air navigation, nor shall it apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Appendix A

Article 35

"Days" defined.

The expression "days" when used in this convention means current days, not working days.

Article 36

Deposit of original covenant, certified copies to be furnished.

This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland, which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

Article 37

Deposit of ratifications.

(1) This convention shall be ratified. The instruments of ratification shall be deposited in the archives of the Ministry for Foreign Affairs of Poland, which shall give notice of the deposit to the Government of each of the High Contracting Parties.

Effective dates, etc.

(2) As soon as this convention shall have been ratified by five of the High Contracting Parties it shall come into force as between them on the ninetieth day after the deposit of the fifth ratification. Thereafter it shall come into force between the High Contracting Parties which shall have ratified and the High Contracting Party which

deposits its instrument of ratification on the ninetieth day after the deposit.

Notification.

(3) It shall be the duty of the Government of the Republic of Poland to notify the Government of each of the High Contracting Parties of the date on which this convention comes into force as well as the date of the deposit of each ratification.

Article 38

Adherence.

(1) This convention shall, after it has come into force, remain open for adherence by any state.

Notices to be given.

(2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Article 39

Denunciations.

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at

once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Article 40

Colonies, protectorates, etc.; application of convention.

(1) Any High Contracting Party may, at the time of signature or of deposit of ratification or of adherence, declare that the acceptance which it gives to this convention does not apply to all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or its authority, or any other territory under its suzerainty.

(2) Accordingly any High Contracting Party may subsequently adhere separately in the name of all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority or any other territory under its suzerainty which have been thus excluded by its original declaration.

(3) Any High Contracting Party may denounce this convention, in accordance with its provisions, separately or for all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority, or any other territory under its suzerainty.

Appendix A

Article 41

Succeeding conferences.

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such conference.

Signatures.

This convention, done at Warsaw on October 12, 1929, shall remain open for signature until January 31, 1930.

For Germany:
R. Richter
Dr. A. Wegerdt
Dr. E. Albrecht
Dr. Otto Riese

For Austria:
Strobele
Reinoehl

For Belgium:
Bernard de l'Escaille

For the United States of Brazil:
Alcibiades Pecanha

For Bulgaria:

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For China:

For Denmark:
L. Ingerslev
Knud Gregersen

For Egypt:

For Spain:
Silvio Fernandez-Vallin

For Estonia:

For Finland:

For France:
Pierre Etienne Flandin
Georges Ripert

For Great Britain and Northern Ireland:
A. H. Dennis
Orme Clarke
R. L. Megarry

For the Commonwealth of Australia:
A. H. Dennis
Orme Clarke
R. L. Megarry

For the Union of South Africa:
A. H. Dennis
Orme Clarke
R. L. Megarry

Appendix A

For the Hellenic Republic:
G. C. Lagoudakis

For Hungary:

For Italy:
A. Giannini

For Japan:
Kazuo Nishikawa

For Latvia:
M. Nuksa

For Luxemburg:
E. Arendt

For Mexico:

For Norway:
N. Chr. Ditleff

For the Netherlands:
W. B. Engelbrecht

For Poland:
Auguste Zaleski
Alfons Kuhn

For Rumania:
G. Cretziano

For Sweden:

For Switzerland:
Edm. Pittard
Dr. F. Hess

Appendix A

For Czechoslovakia:
Dr. V. Girsa

For the Union of Soviet Socialist Republics:
Kotzubinsky

For Venezuela:

For Yugoslavia:
Ivo de Giulli

Additional Protocol

With Reference to Article 2

Additional Protocol.

Ante, p. 3001.

International transportation by State, etc.

The High Contracting Parties reserve to themselves the right to declare at the time of ratification or of adherence that the first paragraph of article 2 of this convention shall not apply to international transportation by air performed directly by the state, its colonies, protectorates, or mandated territories, or by any other territory under its sovereignty, suzerainty, or authority.

Signatures.

For Germany:
R. Richter
Dr. A. Wegerdt
Dr. E. Albrecht
Dr. Otto Riese

Appendix A

For Austria:
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Reinoehl

For Belgium:
Bernard de l'Escaille

For the United States of Brazil:
Alcibiades Pecanha

For Bulgária:

For China:

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For Czechoslovakia:
Dr. V. Girsa

For the Union of Soviet Socialist Republics:
Kotzubinsky

For Venezuela:

For Yugoslavia:
Ivo de Giulli

APPENDIX B.

BATES BLOCK, *et al.*,

Plaintiffs,

v.

COMPAGNIE NATIONALE AIR FRANCE,

Defendant.

Civ. A. Nos. 8286, *et al.*

UNITED STATES DISTRICT COURT,

N. D. GEORGIA, ATANTA DIVISION.

Filed: May 6, 1964

Plaintiff Bates Block, as Executor of the Estate of Charles Baxter Jones, Jr., and the Trust Company of Georgia, as Executor of the Estate of Julia Lowry Block Jones, and Bates Block, as Guardian and Next Friend of three minor children of the deceased Charles Baxter Jones, Jr., and Julia Lowry Block Jones, have brought suit against Compagnie Nationale Air France (hereinafter referred to as Air France) for the negligent deaths of Charles Baxter Jones, Jr., and Julia Lowry Block Jones. The action for both Mr. and Mrs. Jones each alleges two separate claims. The first claim for each of the deceased alleges that death was caused by the "act, fault, imprudence or negligence of the defendant". The second claim for each of the deceased alleges that the deaths were caused by "willful misconduct".

Thirty-one (31) other actions growing out of the same air crash have been filed in this Court, and the complaints,

together with the defensive pleadings, are substantially the same. On October 15, 1963, all of these actions were consolidated pursuant to Rule 42(a), Federal Rules of Civil Procedure, as to a determination of liability of the defendant, with a separate trial as to damages for each claim should the issue of liability be determined in favor of the plaintiffs.

These actions arise out of an air crash of an Air France 707 jet near Orly Field, Paris, France, on June 3, 1962. The decedents were all members of the Atlanta Art Association, and on February 2, 1962, the Atlanta Art Association had entered into an International Charter Flight Agreement with Air France for Air France to furnish the jet liner for flight from Atlanta to Paris on May 9, 1962, with return from Paris to Atlanta on June 3, 1962. The charter charges were $36,000.00. Under the terms of the Charter Flight Agreement Air Franee furnished all the crews, fuel, etc.; and no passenger was to be carried unless such passenger had been issued a ticket by Air France. The International Charter Agreement was made subject to the approval of the Civil Aeronautics Board (hereinafter referred to as CAB) and, thereafter, the approval for this off-route charter was granted by the CAB. The Air France Plane was beginning the return flight to Atlanta according to the International Charter Agreement when the crash occurred, resulting in death to all of the passengers on board.

Plaintiffs instituted these actions in this Court by the filing of complaints, and in one claim of each complaint alleged that the plantiffs decedents died as a result of the defendant's negligence, and that, based on the applicable law, a cause of action for recovery of damages sustained by each of the plaintiffs exists in an unlimited amount. In its answer to each of the complaints, the

defendant alleged that the applicable law is the Warsaw Convention[1] (Convention for the Unification of Certain Rules Relating to International Transportation by Air), and the plaintiffs' claims for unlimited compensatory damages are contrary to the Warsaw Convention, the laws of France, and the contract of carriage.

Plaintiffs, thereafter, filed a motion to strike (Rule 12(f), F.R.C.P.) those parts of the defendant's second defense which rely on the Warsaw Convention or any limitation of liability for damages, whether contained in the said Warsaw Convention, the French Statutory law, the Charter Agreement, or on the ticket.

By order dated January 29, 1964, this Court denied plaintiffs' motion to strike for the reason that the applicability of the Warsaw Convention could not be determined without reference to the facts as to the type of charter arrangement involved in this particular flight, and that, as these facts were not evident from the pleadings, the proper method to proceed would be a motion with supporting affidavits filed pursuant to Rule 56, F.R.C.P. See *Augustus v. Board of Public Instruction of Escambia County, Florida,* 306 F. 2d 862.

Plaintiffs, on March 9, 1964, filed a motion for partial summary judgment (Rule 56, F.R.C.P.) seeking the granting of a partial summary judgment dismissing and striking each and every part of the second defense to each

[1] The Warsaw Convention was a Convention for the Unification of Certain Rules Relating to International Transportation by Air, signed by the representatives of 23 countries at Warsaw, Poland, on October 12, 1929. Adherence to the Convention was advised by the U. S. Senate June 15, 1934, and proclaimed by the President of the United States October 29, 1934. See 49 U. S. Stat. at L. 3000, *et seq.* The Republic of France was one of the original signatory powers.

complaint which asserts that the Warsaw Convention is applicable to this matter, and that the plaintiffs' claims for damages as set forth in their petition are contrary to, in conflict with, or limited by the Warsaw Convention, the laws of France, or any contract of carriage.

Affidavits and briefs having been filed by all parties in compliance with Local Rule 8, the matter is now before this Court for consideration. The Court also considers the briefs, memoranda, and documents heretofore filed by all the parties on the plaintiffs' motion to strike under Rule 12(f) as part of this motion.

From the evidence now presented, it appears that there are no substantial differences as to the facts surrounding the arrangements of the "Jet Trip to the Louvre".

It appears that around November, 1961, a committee of the Atlanta Art Association began working with the American Express Company to obtain a tour for the Atlanta Art Association. Sometime prior to February 2, 1962 (the date of the execution of the International Charter Flight Agreement) more than 100 members of the Association had made plans to make the trip.

The International Charter Flight Agreement provided that the carriage was subject to the rules as established by the Warsaw Convention. This agreement further provided that the Association acted as agent for its members and that a ticket was to be issued to each passenger.

The following provisions from said International Charter Flight Agreement are particularly pertinent:

Appendix B

"Article 4. OPERATIONS, INTERRUPTION OR CANCELLATION OF FLIGHTS

"(a) AIR FRANCE shall have exclusive control over the aircraft chartered hereunder and reserves the rights, in its sole discretion, to determine the route to be flown and airports to be used. . . .

• • •

"(d) The operating personnel are the servants or agents of AIR FRANCE and shall remain at all times under the exclusive control of AIR FRANCE.

• • •

"Article 6. CARRIAGE OF PASSENGERS, BAGGAGE AND CARGO

"Charterer shall not permit any passenger to be carried unless such passenger has been issued a ticket by AIR FRANCE, nor permit any baggage to be carried unless AIR FRANCE has issued a baggage check therefor.

• • •

"AIR FRANCE, Charterer, and all passengers and/or shippers will be bound by the terms and conditions of said AIR FRANCE tickets, baggage checks and air waybills. Any action taken by Charterer with respect to said tickets, baggage checks and air waybills shall be deemed to be taken as agent for the passenger or shipper.

Appendix B

"AIR FRANCE shall have such, and only such, liability to passengers or shippers with respect to the charter flight as exists under the tickets, baggage checks and air waybills so issued by AIR FRANCE. . . .

• • •

"Article 8. LIABILITY

"(a) Carriage furnished herein is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, Poland, October 12, 1929 (hereinafter called 'Warsaw Convention'), unless such carriage is not 'International Carriage' as defined by said Warsaw Convention.

"(b) To the extent not inconsistent with the provisions of this Agreement, the carriage of passengers, baggage and goods herein is subject to the tariffs, conditions of carriage and rules and regulations of AIR FRANCE which are made a part hereof. . . . Charterer declares that he has taken note of the provisions of said tariffs, conditions of carriage and rules and regulations, and undertakes to bring these to the notice of passengers and shippers, participating in the charter flight under this Agreement.

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"(f) This Agreement is entered into by Charterer both on his own behalf and as duly authorized agent of all passengers, and shippers and

consignees and other persons having any interest in the baggage and cargo carried pursuant to this Agreement.

"(g) Charterer undertakes to provide all information necessary for the completing of the traffic documents for all passengers, baggage and goods to be carried. AIR FRANCE will supply and complete the said traffic documents. Charterer will accept delivery of the said traffic documents on behalf of the passengers and-or shippers, and undertakes to convey to each passenger his passenger ticket and baggage check and to each shipper his appropriate air waybill.

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"(j) Charterer shall obey and observe all directions and instructions given to it by the Carrier relating to the charter transportation herein specified and Charterer agrees to indemnify and hold harmless AIR FRANCE, its officers, agents, employees and servants, from all responsibility and liability for any injury, damage, expense or loss to any person or property caused by or arising out of any violation of this Agreement or any negligent act, omission, wrongful misconduct or misrepresentation of Charter, its officers, agents, employees and servants."

NOTE: Schedule A attached to the International Charter Flight Agreement states that the Charterer is an organization "whose principal aims, purposes and objectives are other than travel."

Appendix B

The tickets provided for by the International Charter Flight Agreement were delivered to the passengers three weeks prior to the May 9 Atlanta departure of the aircraft.

As in every case, the question must relate to the pertinent facts, and in these suits, the question is "Does the Warsaw Convention apply to the particular flight here under consideration?"

This Court heretofore, in various hearings, has noted that there are various possible arrangements by which a charter flight might be made and the question therefore is not "Does the Warsaw Convention apply generally to charter flights", but the question is "Does the Warsaw Convention apply to this particular charter flight?"

The Warsaw Convention was signed by the President of the United States on October 29, 1934 (49 U.S. Stat. at L. 3000, at p. 3013) by and with the advice and consent of the Senate (49 U.S. Stat. at L. 3000) as provided by the Constitution (Article 11, Sec. 2, cl. 2).

It is a valid and existing Treaty, *Garcia v. Pan American Airways, Inc.*, 269 App. Div. 287, 55 N.Y.S. 2d 317 (1945), aff'd 295 N. Y. 852, cert. den. 329 U. S. 741, and "constitutes part of the law of this land, overriding state law and policies (U. S. Constitution, Article VI; *Wyman v. Pan American Airways,* 181 Misc. 963, aff'd 267 App. Div. 947, 293 N. Y. 878, cert. den. 324 U. S. 1029).

The Convention first provides when it shall apply. It specifies three exceptions to its applicability (Articles 2 and 34) but does not except charter flights. It pro-

vides a presumption of liability in favor of the passengers and against the carrier (Articles 17 and 20) and a limitation of that liability (Article 22) with an exception to the limitation in the event of willful-misconduct" (Article 25). It provides that if the carrier fails to deliver a ticket notifying the passenger of the applicability of the Convention, the Convention shall still apply, but the limitation of liability shall not apply (Article 3).

Like any other treaty or statute, if the facts come within its general provisions, and not with an exception, then the Treaty applies.

Article 1 of the Treaty provides that:

> "This Convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise."

From the pleadings, it is undisputed that the passengers were being transported as passengers for hire by the aircraft. The Convention applies to "all international transportation of persons . . . by aircraft for hire". Thus, the Warsaw Convention applies if this was "international transportation" within the meaning of the Convention. The Convention leaves no doubt as to what is meant by "international transportation". Article 1 (2) defines it as follows:

> "For the purposes of this convention, the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a

break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention."

That Article provides that any transportation—scheduled or non-scheduled, common or private carriage, charter or otherwise—is "international" within the meaning of the Convention if the agreed-to transportation (1) is between two nations which are parties to the Convention, or (2) is "round-trip", leaving from and returning to a nation which is a party to the Convention, with an "agreed stopping place" outside the nation (whether or not the nation where the stop is made is a party to the Convention). France, the "agreed stopping place" on the subject flight, is a party to the Warsaw Convention, but the Convention would apply even if France were not a party, because the place of departure (Atlanta) and the place of termination (Atlanta) are both in the United States, which has adopted the Convention. "Round-trip" flights departing from and returning to the United States are subject to the Convention. *Ross v. Pan American Airways, Inc.*, 299 N. Y. 88, 85 N. E. 2d 880 (1949).

Thus, reading Article 1, it is clear that the "transportation" which is the subject of these actions was "international" within the meaning of the Convention, and the Convention applies to "any" and "all" such international transportation by air.

The plaintiffs in the pending suit have contended that the Warsaw Convention does not apply to charter flights.

While it is true that this question has never been the principal issue in any of the decisions decided by the Courts in this country which this Court has been able to read, and the question seems to be novel, other courts, where the issue could have been presented, have indicated that, in a similar factual situation, Warsaw would apply.

In *Flying Tiger Line, Inc. v. United States,* 170 F. Supp. 422 (Ct. Claims 1959), the plaintiff, Flying Tiger, had entered into a "Charter Agreement" with the United States to carry cargo. One of its planes, carrying $67,159.91 in goods, was lost. The question was whether the Warsaw Convention and its two-year limitation period applied. The Court said, at Page 423:

> "There is no serious question as to the applicability, in general, of the Warsaw Convention to the transportation involved in this case."

The transportation there involved was "chartered", yet the Court recognized that the Warsaw Convention was applicable "to the transportation involved"—charter transportation.

In the recent case of *Mertens v. Flying Tiger Line, Inc.,* 8 CCH Avi. Cases 18,023, which was a case from the U. S. District Court for the Southern District of New York, the plaintiffs sued for the death of a passenger en route from California to Tokyo aboard a chartered aircraft. The United States Government had chartered the plane from the carrier, Flying Tiger, to transport military personnel. The plaintiffs sued to recover for the wrongful death of their son, Lieutenant Frederic Thorn Mertens, a passenger on a plane operated by the defendant airline under charter to the United States Govern-

ment. The plane was on a trip from California to Japan, by way of Honolulu and Wake Island. On September 9, 1958, as it was nearing its destination near Tokyo, it crashed into a mountain, resulting in the destruction of the plane and the death of all those aboard, including Lieutenant Mertens.

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> "The fatal flight which was the subject of this litigation was an international flight pursuant to the terms of the Warsaw Convention. The uncontroverted facts, the allegations of the complaint, the pre-trial order, and the prior agreement of the parties[2] made this a basic element of the case."

Plaintiffs argue that the Flight Agreement provision that the charterer was the agent of the passengers was an attempt to create a direct contractual relationship between carrier and passenger which they have contended must exist in order for the Convention to be applicable. No such direct contractual relationship is required by the Convention,[3] and in any event the direct contractual relationship existed here.

The provision of the International Charter Flight Agreement that the Charterer acted as agent for the passengers was required by the CAB pursuant to statute. The

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[2] In an opinion filed on June 3, 1963, dealing with a jurisdictional motion, Judge Wyatt of this Court said: "The parties are in agreement that the Warsaw Convention is here applicable."

[3] See *Ross v. Pan American Airways, Inc.*, 299 N. Y. 88, 85 N. E. 2d 880, 885, where the Court said: "Furthermore, while the Convention speaks of transportation under a contract and requires delivery of a ticket warning of the limitations, it is plain that the limitation is one created by the Convention itself, and is not the product of consensual arrangements between the parties".

Appendix B

CAB regulates air carriers and through them, regulates travel agents handling air transportation. The CAB has promulgated rules and regulations governing charter flights. Those rules and regulations are contained in Parts 295 (26 Federal Register 3628) and 212 (23 Federal Register 7062) of the Board's Economic Regulations (14 CFR), both of which are applicable to the flight here under consideration. The United States Government prohibits travel agents and others from chartering an aircraft at a charter rate and then selling tickets to the traveling public [CAB Economic Regulations, 14 CFR, §295.20[4] and 212.1(b)]. Travel agents are permitted (as agents of the carrier) to sell airline tickets but only on scheduled trips at the regular fare established for common carriage transportation available to all members of the public. [Sec. 403(b) of the Federal Aviation Act, 49 U. S. C., Sec. 1373 (b)]. On the other hand, the CAB allows individuals and pre-existing groups and associations, not formed merely for the purpose of chartering an airplane to make trans-atlantic charter trips at group fares. (CAB Economic Regulations, 14 CFR, Secs. 295.2 and 212.1). 14 CFR, Sec. 212.1, provides that for passengers a charter agreement may be made:

> (1) By a person for his own use;
>
> (2) By a person (no part of whose business is the formation of groups for transportation or solicitation or sale of transportation services) for the transportation of a group of persons as agent or representative of such group;

[4] CAB Economic Regulation, 14 CFR, §295.20, provides: "A travel agent may not assist in the organization or assembly of a charter group, handle the sale of the air transportation to any individual members of a group, or otherwise engage in the administration of the charter flight. . . ."

(3) By two or more persons acting jointly for the transportation of such group of persons, or their property.

"Person" is defined so as to include "association" or "corporation" [49 U. S. C., §1301(27)]. Thus, the Atlanta Art Association, an association not engaged in transportation directly or indirectly, could obtain group rate transportation for its members, if the charter is made by the Association as an agent or representative of such group. The CAB required that such a charterer act as agent for the passengers, and the Flight Agreement in this case was made in compliance with that rule of the CAB. Without such an arrangement, under its rules, the CAB would have disapproved the Charter Flight Agreement here involved.

From the evidence, it is clear that the CAB prescribed the form of and expressly approved the charter agreement here used, and this charter agreement included a provision clearly declaring that the Warshaw Convention applied. When the Atlanta Art Association, through its president, executed the International Charter Flight Agreement as agent for the pasengers, a direct relationship arose between Air France and each passenger. The contract called upon Air France to furnish "air transportation"; thus, it was a transportation contract, a "contract of carriage".

Also, the International Charter Flight Agreement provided for the issuance of a ticket to each passenger, which would bind Air France and the passengers in a two-party agreement. These tickets were issued and delivered to the passengers approximately three weeks before the flight was initiated and, under the Flight Agreement, the passengers obligated themselves to be bound by the

tickets. When the tickets were issued and delivered, as they were in this case, the requirement of the Flight Agreement insofar as tickets were concerned was fulfilled. Each ticket issued pursuant to the International Charter Flight Agreement was a "contract of carriage" between the holder and Air France.

The Warsaw Convention itself says it shall apply to "any" (Article 1, Paragraph 2) and "all" (Article 1, Paragraph 1) air transportation for hire between France and the United States. The plaintiffs contend that the Convention does not include charter flights. However, unless there is a clear exception in the Convention removing charter flights from its operations, Warsaw would apply.

Article 3 of the Warsaw Convention provides as follows:

> "(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
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> "(a) The place and date of issue;
>
> "(b) The place of departure and of destination;
>
> "(c) The agreed stopping places. . .;
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> "(d) The name and address of the carrier or carriers;
>
> "(e) A statement that the transportation is subject to the rules relating to liability established by this convention.
>
> "(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been

delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

The undisputed evidence establishes that the requirement of ticket delivery was met in the instant cases. The examination of the tickets themselves shows that they contained all the necessary particulars specified in Article 3 of the Convention.

Even the absence of tickets would not render Warsaw inapplicable. Warsaw applies to "any" and "all" transportation by aircraft for hire between the High Contracting Parties. If a ticket had not been delivered, or if it had omitted a required provision, Warsaw would still apply, but the limitation of liability would not. (Article 3, Paragraph 2). The facts show that the proper tickets were delivered; thus, a contract of direct carriage arose between Air France and the various plaintiffs. See *Ross v. Pan American Airways, Inc., supra.*

In the *Ross* case, Mrs. Ross was injured in an air accident while traveling during World War II as an entertainer for the U.S.O. The evidence in that case showed that one Abraham, an employee of the U.S.O., made the arrangements for the transportation of all the group of U.S.O. entertainers, and the United States Army paid for the tickets. Mrs. Ross never personally received her ticket but it was placed in front of her by Abraham at the airport ticket counter along with her passport. The tickets were returned to Abraham and the entertainers were given a "slip of paper" (but not the "ticket itself") admitting them to the airplane. The Court overruled Mrs. Ross' argument that she authorized no one to either accept delivery of a ticket for her or

to bind her to any limitation of the carrier's liability, holding that, at 85 N. E. 2d 884, 885:

> "Whether or not this all added up, as a matter of law, to a sufficient showing of authority in Abraham, it can hardly be disputed that, when a ticket, bearing appellant's name and all particulars as to the intended route as well as a reference to the Warsaw Convention limitation, was laid in front of appellant on the table in the airport, she, by thereafter boarding the plane as a traveler on that ticket, impliedly, if not expressly, ratified and adopted what had been done by the Army, and later by Abraham, in taking out that ticket in her name.
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> * * *
>
> "Since the Convention itself, as a statute, grants and mandates the limitation unless 'the carrier accepts a passenger without a passenger ticket having been delivered', there is no need for a carrier who claims the limitation to show more than the delivery of an appropriate ticket and travel of the passenger thereunder."

When the carrier shows the delivery of the appropriate ticket and the travel of the passengers thereunder, the Warsaw Convention applies. No direct contract between the parties is required. No overt consent to be bound, other than travel on the ticket, is required. The presence of third parties, such as Atlanta Art Association, is immaterial. The Warsaw Convention applies.

The Warsaw Convention contains only three exclusions. The Treaty does not apply to claims for loss of mail (Article 2), and it does not apply to transportation per-

formed by the United States (49 U. S. Stat. at L. 3013). Clearly, neither of these exceptions is applicable here.

The third exclusion is found in Article 34, which provides that:

> "This Convention shall not apply to international transportation by air performed by way of experimental trial by air navigation enterprises with the view to establishment of regular lines of air navigation, nor shall it apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business."

Thus, Article 34 applies in only two instances: (1) to "transportation by air performed by way of experimental trial by air navigation enterprises with the view to establishment of regular lines of air navigation"; and (2) to "transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business".

Clearly, the first exception is not applicable here.

The second exception provided by Article 34 itself contains two essential qualifications: (a) "extraordinary circumstances", and (b) "outside the normal scope of an air carrier's business". As shown by plaintiffs' own allegations, neither essential existed here. There was nothing "extraordinary" about this flight, and it was in the normal scope of Air France's business.

Thus, it can be seen that Warsaw applies to "any" and "all" transportation by aircraft for hire between France and the United States, excepting only those three matters expressly excluded: (1) Damage to mail; (2) Transportation performed by the United States Government; and (3)

Those situations specifically mentioned in Article 34. None of these exceptions is applicable here.

This Court holds that, under the factual situation in the cases at hand, where the Atlanta Art Association chartered an aircraft from Air France for the carriage of passengers on a specific flight from the United States, a High Contracting Party to the Warsaw Convention, to France, another High Contracting Party to the Warsaw Convention, with return to the United States; where Air France, the air carrier, owns, operates, and controls the aircraft and, prior to departure, delivers proper tickets to the passengers for their passage, the Warsaw Convention would be applicable, and the passenger or passengers would be entitled to the presumption of liability contained in the Warsaw Convention as against Air France, and Air France, the air carrier, would be entitled to the limitation of liability also contained in the Convention as against the passengers.

As set out in the opinion above, the clear applicability of the Warsaw Convention to the facts of the instant suits has been demonstrated by reference to the provisions of the Convention itself and the court decisions dealing with Warsaw. This Court concludes that the language contained in the Warsaw Convention is not ambiguous, and deems it unnecessary to resort to a discussion of the legislative history of the Treaty. See *United States v. Shreveport Grain & Elevator Company,* 287 U. S. 77, 77 L. Ed. 175; *Hildalgo County Water Control and Improvement District v. Hedrick,* 226 F. 2d 1 (10), (C. A. 5, 1955).

Neither does the plaintiffs' contention that the Warsaw Convention is contrary to the state public policy of Georgia have merit. In the *Indemnity Insurance Com-*

pany of North America v. Pan American Airways, Inc., 58 F. Supp. 338 (S.D.N.Y. 1944), the plaintiff argued that the Warsaw Convention did not apply as a treaty and also argued (as the plaintiffs have done in the instant suits) that the Convention did not apply by agreement, as part of the contract of carriage.

After finding the Convention itself to be applicable, the Court went on to hold the defense based on the contract limitations to be valid. Regarding the plaintiff's contention in that case that the contractual limitation of liability was ineffective, the Court held, at Page 340:

> "The ineffectiveness of the contract of transportation to limit defendant's liability is predicated upon the invalidity or inoperativeness of the treaty. Since the premise fails the argument must fall. The public policy against contractual limitation of liability by common carriers . . . must bow to the overriding policy of the treaty. *United States v. Pink*, 1942, 315 U. S. 203, 231, 62 S. Ct. 552, 86 L. Ed. 796; *United States v. Belmont*, 1937, 301 U. S. 324, 327, 57 S. Ct. 758, 81 L. Ed. 1134."

State public policy must bow to the overriding policy of the Treaty.

In *Garcia v. Pan American Airways, Inc.*, 55 N. Y. S. 2d 317, 269 App. Div. 287 (1945), aff'd 295 N. Y. 852, 67 N. E. 2d 257, cert. den. 329 U. S. 741, 67 S. Ct. 79, *supra*, the Court stated (55 N. Y. S. 2d at Page 321):

> "Inasmuch as the Convention, as a treaty, constitutes part of the law of this land, overriding state law and policies (U. S. Const., Art. VI; *Wyman v. Pan American Airways*, 181 Misc. 963, aff'd 267 App. Div. 947, 293 N. Y. 878, cert. den. April 23,

1945, 324 U. S. 1029; *United States v. Pink,* 315 U. S. 203, 230, 231), its provisions supersede the usual doctrine that the right and measure of recovery are governed by the *lex loci* and not by the *lex fori.* It comes to this: One is not bound to seek redress in the courts of this country. He may submit to the jurisdiction of the foreign state and, presumably, have his rights determined in accordance with the law of that place. That is not our concern. But if he institutes action here, the law which we will apply is that set forth by the terms of the Convention, even though it be inconsistent with the law of the place. Comity is abridged to that extent. (*The Titanic,* 233 U. S. 718; *Royal Mail S. Packet Co. v. Companhia de Nav. Lloyd Brasileiro,* 31 F. 2d 757; *The Mandu,* 102 F. 2d 459)."

In *Amaya v. Stanolind Oil & Gas Company,* 158 F. 2d 554 (C. A. 5, 1946), cert. den. 331 U. S. 808, 67 S. Ct. 119, the Court of Appeals for the Fifth Circuit stated at Page 556:

> "A treaty lawfully entered into stands on the same footing of supremacy as does the Constitution and Laws of the United States . . . A treaty must be regarded as a part of the law of the state as much as are the state's own statutes and it may override the power of the state even in respect of the great body of private relations which usually fall within the control of the state."

Georgia public policy does not control these actions. Federal public policy controls, and Federal public policy authorizes limitations of liability in international transportation by aircraft as shown by the United States' adherence to the Warsaw Convention. See *J. B. Effenson*

Company v. Three Bays Corporation, 238 F. 2d 611 (C. A. 5, 1956). The decision of the Fifth Circuit Court of Appeals in *J. B. Effenson Company v. Three Bays Corporation, supra,* is in point on the matter now being considered. Federal public policy governs the contracts in these suits (the International Charter Flight Agreement and the tickets). Federal public policy authorizes limitations of liability in international air transportation by aircraft, in the amount of $8300.00 (49 U. S. Stat. at L. 3019; Warsaw Convention, Article 22). Regardless of the consequences, this Court is bound by the Treaty, the decisions, and the public policy established by the Treaty.

Reasoning similar to that used by this Court of Appeals in *Effenson v. Three Bays, supra,* has been applied in a Warsaw-contract case. In *DaCosta v. Caribbean International Airways, Limited,* 4 CCH Avi. Cases, 17,792 (S.D.Fla., 1955), the United States District Court for the Southern District of Florida had before it a case in which a decedent had been traveling between two points in the British West Indies. Although the transportation was not "international" within the meaning of the Warsaw Convention, the ticket used by the defendant air carrier contained a limitation of liability, "the same as that contained in the Convention for the Unification of Certain Rules Relating to International Transportation by Air Commonly called the Warsaw Convention Treaty, 49 Stat. 3000". The carrier relied not on the Convention itself, but upon the limitation of liability provision in the ticket. There, as here, the plaintiffs had attacked the contract defense, arguing that state public policy would not permit the enforcement of such a contractual limitation. The defendant contended that the terms of the contract were the same as provided by the Warsaw Convention, which the United States had adopted, and that state public policy could not overrule a contract provision

which was the same as that provided for by the Treaty. In its decision, the Court stated, at Page 17,794:

> "It cannot be said that a separate covenant in a contract, which corresponds with the amount established in a treaty, is unreasonable as to amount, or that the theory of limitation of liability is against the public policy of a state when, by treaty, the theory of limitation of liability is a part of the law of the state under circumstances where the treaty is applicable. This is not meant to intimate that the treaty is applicable to this case; it is not. But, as to carriage foreign in nature, and not domestic, the law of Florida recognizes the existence of a theory of limited liability and the reasonableness of the amount stated in the defendant's second defense."

The Court went on to say that "the public policy of Florida is determined by the law of Florida and the Constitution, treaties, and laws of the United States". Recognizing that the mere existence of the Warsaw Convention overruled traditional state public policy and created a public policy which allows, as to foreign air carriage, a limitation of liability in the amount of the Warsaw Convention, the Court held the contractual defense to be valid.

Even when Warsaw is not applicable directly, it establishes a Federal public policy which affects state public policy. It is not against U. S. public policy for parties to agree between themselves to be governed by the same terms as are provided for in U. S. law by the Warsaw Convention. The law of the United States (the Convention) permits air carriers engaged in international transportation to contract for limited liability. What the Treaty allows, state public policy cannot disallow. By the same token, it is not against U. S. public policy for France (the place of the accident) to have, and for this

Court to give effect to, an applicable law (Law No. 57-259 of March 2, 1957) which provides the same limitation of liability as the Warsaw Convention. The law of France provides that the rules of the Warsaw Convention apply to all aviation accidents occurring in France. This French law limits the liability of the carrier in the same manner and in the same amount as does Warsaw, which is the law of this land. If French law were against our public policy, then the Warsaw Convention would be against our public policy. However, the French law is in complete harmony with our public policy. Both the United States and the Republic of France have adopted the Warsaw Convention.

For the reasons stated above, the plaintiffs' motion for partial summary judgment with respect to Air France's three separate and independent defenses—(1) the Warsaw Convention, (2) the contracts between the parties, and (3) the French Law—is hereby denied. This partial summary judgment is to control the numbered cases listed in the footnote below.[5]

This the 6th day of May, 1964.

(Signed) LEWIS R. MORGAN
LEWIS R. MORGAN
United States District Judge

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[5] Civil Action No. 8286
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Appendix B

MOTION TO AMEND ORDER

Filed: May 8, 1964

Come now the plaintiffs, Bates Block, et al., and move the Court to amend its order of May 6, 1964 in the above captioned case, which order denied plaintiffs' motion for partial summary judgment, by stating that said order involves a controlling question of law which is determinative of a basic issue in the case and as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Respectfully submitted:

(Signed) WILLIAM H. SCHRODER
(Signed) HUGH DORSEY
(Signed) HERBERT RINGEL
Attorneys for Plaintiffs

Appendix B

ORDER

Filed: May 11, 1964

United States District Court
Northern District of Georgia
Atlanta Division

Bates Block, Et Al.,

Plaintiffs

vs. Civil Action Nos. 8286, et al.,

Compagnie Nationale Air France,

Defendant

The Court having on May 6, 1964 entered an order in the above captioned case denying plaintiffs' motion for a partial summary judgment;

NOW, THEREFORE, pursuant to 28 USCA, Section 1292(b), said order is amended by adding as a final paragraph thereto the following statement:

> "The Court is of the opinion that this order involves a controlling question of law which is determinative of a basic issue in the case and as to which there is a substantial ground for difference of opinion, and that an immediate appeal from this order may materially advance the ultimate termination of the litigation."
> IT IS ORDERED.

This 11th day of May, 1964.

(Signed) LEWIS R. MORGAN
LEWIS R. MORGAN
United States District Judge

APPENDIX C.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21609

BATES BLOCK, *et al.*,

Appellants,

versus

COMPAGNIE NATIONALE AIR FRANCE,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(November 8, 1967.)

Before JONES and WISDOM, Circuit Judges, and BREWSTER, District Judge.

WISDOM, Circuit Judge: June 3, 1962, an Air France Boeing 707 jet liner beginning the final leg of an Atlanta-Paris-Atlanta "Jet Trip to the Louvre" crashed at Orly Field, Paris, France. Everyone aboard was killed. The 122 passengers were all members of the Atlanta Art Association. February 2, 1962, the association had entered into an "International Charter Flight Agreement" with Air France for the airline to furnish the plane for the flight at the cost of $36,000.

Appendix C

The plaintiffs instituted forty-five actions against Air France for the deaths of sixty-two of the passengers. These actions were consolidated under Fed. R. Civ. P. 42(a) for a determination of liability, separate trials to be held on the issue of damages.

Air France asserts three defenses: (1) that the flight was governed by the Warsaw Convention, ratified and adhered to by the United States, limiting recovery to a maximum of $8291.87 for each person killed,[1] (2) that the contract of carriage (as set forth in the Charter Flight Agreement or in the ticket or in both) explicitly incorporates by reference the Warsaw limitation; (3) that the law of France, where the accident occurred, governs the case, and under French law the Warsaw limitation is applicable.

The plaintiffs contend that the Warsaw Convention does not apply to charter flights.[2] Accordingly, they

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[1] The Warsaw Convention, officially entitled "A Convention for the Unification of Certain Rules Relating to International Transportation by Air" was signed by the representatives of 23 countries at Warsaw, Poland, October 12, 1929. About ninety countries now adhere to it. The United States did not participate in the Conference. June 15, 1934, however, the United States Senate advised adherence to the Convention and October 29, 1934, President Roosevelt proclaimed adherence. See 49 U.S. Stat. at L. 3000-3026, p. 3013 (1935).

November 15, 1965, the State Department delivered a Notice of Denunciation of the Convention to the Polish Government, effective May 15, 1966. Dept. State Press Release No. 268, Nov. 15, 1965; see N.Y. Times, Nov. 16, 1965, p. 82, col. 1 (city ed.). May 14, one day before the denunciation was to become effective, the United States withdrew its notice of denunciation with the announcement that the Civil Aeronautics Board had approved an agreement between the United States and the large majority of international air carriers, increasing the limits of international air carrier liability from $8,300 to $75,000. Dept. State Press Release No. 268, Nov. 15, 1965. The Convention, as supplemented by the agreement, remains in effect pending the establishment of more permanent arrangements between the governments. Air France signed the agreement but too late to affect the parties in this case.

[2] The plaintiffs here do not contend that the decedents failed to receive proper delivery of the tickets or proper notice of the Warsaw limitation of liability.

For limitation of liability to apply, the passenger's ticket must state that the flight is subject to the provisions of the Convention. Art. 3(2); Art. 3(1)(e). The ticket must be delivered in time and

filed a motion for a partial summary judgment under Fed. R. Civ. P. 56 seeking a judgment dismissing and striking each part of the defenses that asserts the applicability of the Convention. The district court denied the motion. *Block v. Air France,* N.D.Ga. 1964, 229 F. Supp. 801. The court found:

> "Under the terms of the Charter Flight Agreement Air France furnished all the crews, fuel, etc.; and no passenger was to be carried unless such passenger had been issued a ticket by Air France. The International Charter Agreement was made subject to the approval of the Civil Aeronautics Board. . . . From the evidence now presented, it appears that there are no substantial differences as to the facts surrounding the arrangements of the 'Jet Trip to the Louvre'."

(Footnote continued)

in such a manner as to enable a passenger to take out insurance. *Mertens v. Flying Tiger Lines, Inc.,* 2 Cir. 1965, 341 F. 2d 851; *Warren v. Flying Tiger Lines, Inc.,* 9 Cir. 1965, 352 F. 2d 494. The Second Circuit has recently held that the Convention requires not only delivery of the ticket (Art. 3(2)) but actual notice of the limitation (Art. 3(1)(e)); liability limitations in "Lilliputian print in a thicket of 'conditions of Contract'" frustrates the purpose of the delivery requirement. *Lisi v. Alitalia-Linee Aeree Haliane,* S. p. A., 1966, 370 F. 2d 508. By agreement among 28 American and foreign airlines, each passenger must now receive a notice printed in ten-point type advising him of the liability limitations. CAB Press-Release, No. 66-61; 382-6031, May 31, 1966. In November 1961 The Atlanta Art Association began working with the American Express Company to arrange a charter flight to Paris. The charter, executed February 2, 1962, provides: "Carriage furnished herein is subject to the rules relating to liability established by the [Warsaw] Convention. . . . Charterer declares that he has taken note of the provisions of said tariffs, conditions of carriage and rules and regulations, and undertakes to bring the notice of passengers and shippers participating in the charter flight under this Agreement." The tickets, each containing similar language and each marked "Chtr Contract", were delivered to the passenger on April 17, 1963, three weeks before the departure May 9 and six weeks before the accident. See generally Lacey, Recent Developments in The Warsaw Convention, 33 J. Air L. & Com. . . . ., ... (1967).

Appendix C

The court correctly limited the issue:

> "This Court heretofore, in various hearings, has noted that there are various possible arrangements by which a charter flight might be made and the question therefore is not 'Does the Warsaw Convention apply generally to charter flights', but the question is 'Does the Warsaw Convention apply to this particular charter flight?'"

The court held:

> "[U]nder the factual situation in the cases at hand . . . where Air France, the air carrier, owns, operates, and controls the aircraft and, prior to departure, delivers proper tickets to the passengers for their passage, the Warsaw Convention would be applicable, and the passenger or passengers would be entitled to the presumption of liability contained in the Warsaw Convention as against Air France, and Air France, the air carrier, would be entitled to the limitation of liability also contained in the Convention as against the passengers."

We affirm. The Warsaw Convention applies to the international transportation of passengers under a contract of carriage on a "voyage" charter flight. The plaintiffs' recovery of damages in the instant cases therefor is limited to the amount allowed by that treaty. We find it unnecessary to pass upon Air France's other defenses.

I.

At the time the Warsaw Conference was held, October 1929, civil aviation was in its infancy.[3] Lindberg had

[3] "The total airline operations in the five-year period 1925 to 1929—in domestic as well as foreign travel—were only 400 million passenger miles. The fatality rate was 45 per 100 million passenger miles. This compares with the rate of 0.55 fatalities per 100 million

flown the Atlantic only two years before. The sole international air carrier in the United States operated flights between Havana and Key West.[4] The United States declined an invitation to attend the Conference, although it sent two observers, John Ide and McCeney Werlich.

The Warsaw Convention was the result of extensive preparatory work, commencing with the first Conférence Internationale de Droit Privé Aérien, held in Paris in 1925. The Paris Conference appointed a committee of experts in international air law, the Comité Internationale Technique d'Experts Juridique Aériens (Citeja), officially translated in United States documents as "International Technical Committee of Aerial Legal Experts". Citeja has had primary responsibility for preparing draft conventions submitted to various conferences on international air transportation.[5] American observers were present at the Paris Conference and at meetings of Citeja during the years 1927 through 1930. From 1931 on, the United States appointed official representatives to Citeja. The Paris Conference prepared a preliminary draft convention on the liability of air carriers and assigned certain topics for further study to Citeja. One of these topics was

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(Footnote continued)

passenger miles in 1965. 1965 Annual Report of the ICAO Council to the ICAO Assembly 13. The larger airliners could carry 15 to 20 passengers at cruising speeds of about 100 miles per hour and over stages of about 500 miles. The most advanced and popular United States aircraft, the Lockheed Vega, which carried six passengers and a pilot, had a cruising speed of about 120 miles per hour and a range of about 500 miles. . . ." Lowenfeld and Mendelsohm, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 498 (1967).

[4] Wright, The Warsaw Convention's Damage Limitations, 1957 Clev.-Mar. L. Rev. 290-91.

[5] See Ide, The History and Accomplishments of the Citeja, 3 J. Air L. & Com. 27 (1932). Mr. Ide was the United States observer at Citeja (1929-31) and at the Warsaw Conference.

"location des aéronefs", a generic term meaning the hiring and renting and, sometimes, chartering of airplanes.[6]

The Conference achieved its two primary objectives: (1) uniform rules relating to air transportation documents (passenger ticket, baggage check, and air waybill); (2) limitation of the carrier's liability for an airplane accident. In accomplishing the second objective, the Conference recognized the need for a quid pro quo by establishing a presumption of the carrier's liability, thereby shifting the burden of proof from the passenger to the carrier. (Article 20.[7]) Secretary of State Cordell Hull, in transmitting the Warsaw Convention to the United States Senate in 1934, explained:

> "It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that

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[6] The plaintiffs and the defendants dispute the translation of "location des aéronefs". The literal meaning is "hiring of aircraft". The plaintiffs' translator, who was also used by the defendant, translated the term as "chartering of aircraft". Later, by affidavit, he averred: "The most accurate translation of the French word 'location' into English is 'hiring', 'leasing' or 'renting' . . . . Correct and proper translation of the French word 'location' is not 'chartering'." However, in the legislative history of the Warsaw Convention, the term was sometimes used to include chartering and sometimes used interchangeably with "affrètement" (chartering) and "charte" (charter). British Regulations define "charter service" as air transport service "under a contract of hire". Civil Aviation (Licensing) Regulations, 1960, No. 2-2. The Civil Aeronautics Board defines "charter trip" as "air transportation performed by an air carrier . . . where the entire capacity of one or more aircraft has been engaged for the movement of persons . . . or . . . property on a time mileage or trip basis". Title 14, Part 207, E R-419, 29 F.R. 13249, Sept. 24, 1964.

[7] Article 20. Exemptions.

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges. . . .The principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability, seems to be reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportation."[8]

II.

On its face, the Warsaw Convention seems to cover all international carriage by air, without any limitation whatever.

A. Article 1(1) states the scope of the treaty:

"This Convention shall apply to *all international transportation* of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise." (Emphasis added.)

Article (1)(2) defines "international transportation":

"For the purposes of this convention, the expression 'international transportation' shall mean *any* transportation in which, according to the contract made by the parties, the place of departure and

[8] Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 (1934).

> the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention."

The district judge found Article 1 so clear that he concluded, "The language contained in the Warsaw Convention is not ambiguous, and [the court] deems it unnecessary to resort to a discussion of the legislative history of the Treaty."

B. The Convention makes only three exceptions to the wide sweep of Article 1. None covers this Air France charter flight. First, Article 2(2) excludes "transportation performed under the terms of any international postal agreement". Second, Article 34 excludes "international transportation by air performed by way of experimental trial by air navigation enterprises with the view to the establishment of regular lines of air navigation". Third, Article 34 also excludes "transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business."[9]

The third exception is the only one that, arguably, might encompass the Air France flight. This provision, how-

[9] This is an instance where the English translation is awkward and it is helpful to read the provision in the original French version: "A présente Convention n'est applicable . . . aux transports effectués dan les circonstances extraordinaires en dehors de toute opération de l'exploitation aérienne." "The relation", Sundberg and others have pointed out, "is there not to the particular type of business carried on by one carrier, but to the general nature of aerial exploitation". See Sundberg, Air Charter: A Study in Legal Development 261 n.83 (Stockholm 1961), made part of the record below.

ever, was intended from the start to have a very narrow application. In placing the draft convention before the conference, Henri De Vos of Belgium, Rapporteur of the Conference, gave as an example of an "extraordinary" situation a rescue mission sent to pick up passengers and baggage from an earlier flight that had been forced down. He described such a rescue flight as one that "could not be made under normal conditions."[10] Professor Georges Ripert, delegate from France, author of Article 34, explained that in such exceptional circumstances certain requirements established by the Convention, such as the delivery of a passenger ticket and baggage check, could not be observed.[11] Several delegates complained that this provision would open a dangerous loophole in the Convention.[12] To allay their fears, Professor Ripert stressed that this exception was not a broad loophole.[13] Just before the conference was to take a final vote on Article 34, Amedee Giannini, head of the Italian delegation, who had cautioned Ripert earlier about the dangers inherent in the provision,[14] emphasized the narrowness of the provision.[15]

The parties to the treaty and their delegates to the Conference were well aware that the Convention was to apply to a developing industry. See Section IV C of this opinion. Although charter flights such as the one before us might once have been rare, they were never extraordinary in the sense that they were "outside the

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[10] II Conférence Internationale de Droit Privé Aérien, Oct. 4-12, Warsaw, Procés-Verbaux p. 58.

[11] *Ibid.*

[12] See statements by Sir Alfred Dennis of Great Britain, *id.* at 58, and Sabanine of Russia, *id.* at 58.

[13] See the interchange between Ripert and Giannini of Italy, *id.* at 58.

[14] *Id.* at 58.

[15] *Id.* at 145.

normal scope of an air carrier's business".[16] Night flights and transatlantic flights were "exceptional" in 1929, and jet flights unknown, but there is no question as to the applicability of the Warsaw Convention to a transatlantic jet flight at night.

C. Had the Warsaw framers intended to create an exception for charter flights it is difficult to see why they did not include a specific provision in the Convention, such as they did in Article 2(1) for flights conducted under the terms of any international postal convention and in Article 34 for experimental or extraordinary flights. There is no valid reason to except *all* charter flights. In some charters, perhaps, the responsibility is so divided as to create a problem in determining who is the carrier for purposes of the Convention, but where this problem does not exist, as in a voyage charter where the owner (airline) is also the operator, there is no practical difference between a charter flight and an ordinary scheduled commercial flight.

Looking to the realities rather than to traditional concepts, which vary from country to country, air charters may be divided into basic types.[17] (1) In a "bare-hull",

[16] "As early as 1933, Blanc-Dannery pointed out that air taxi flights were not properly in the Article 34 category of operations. 'Toutes les compagnies aériennes, à la demande d'un client, le font conduire à l'endroit où il désire. On ne peut dire que ce sont des transports réguliers et pourtant ils rentrent bien dans le cadre de l'exploitation aérienne normale.' La Convention de Varsovie et les régles due transport aérien international, thése Paris 1933 p. 20. What was true of air taxi flights in 1933 is certainly true of charter flights today. Whatever the type of the air commerce contract, success and volume business exclude the application of Article 34." Sundberg, Air Charter: A Study in Legal Development 261-262 (Stockholm 1961). See also Coquoz, Le Droit Privé Internationale Aérien 165 (Paris 1938). "The whole question of the application of Article 34, furthermore, under the Hague Protocol looses interest. This Protocol provides that as to cases properly fitting under Article 34, it is not the whole of the Convention that is excluded, but only Articles 3 to 9 of the documentary chapter." Sundberg 263.

[17] The three categories of charter are widely recognized. Grönfors, Air Charter and the Warsaw Convention 15-16 (Martinus Nijhoff, The Hague 1956); Drion, Limitation of Liabilities in International Air Law (The Hague 1954); Sundberg.

"hire", or "lease" charter the owner (airline) merely supplies a plane, without a crew, to a charterer, who may use it where and when he pleases; the charterer furnishes the crew, and pays the expenses of operating the aircraft. (2) In a "time charter" the airline provides the charterer with an equipped plane and crew for a specific period of time to use as the charterer wishes. (3) In a "voyage charter" the owner charters his fully equipped plane and crew for a predetermined voyage. In a voyage charter, such as that entered into by Air France and the Altanta Art Association, the owner controls and operates the aircraft. In effect, the middleman is eliminated, except for purposes of negotiating the charter. Although there are these three basic types of air charters, somewhat analogous to maritime charters, the degrees of control, discretion, and responsibility of the charterer can vary enormously from case to case, from the extreme bare hull charter arrangement in which the airline relinquishes total control all the way to the charter in this case where the charterer's role is totally unconnected with the physical operation of the flight. If the points of departure, stopping places, and destination of a flight are not stated in a charter, the charter flight would not come within Article 1(2). But there is nothing in Article 1 or in any other article in the Convention that would bar applicability of Warsaw to a voyage charter of the kind entered into between Air France and the Atlanta Art Association.

D. The title of the Convention is modest. It purports to apply only to *certain* rules relating to air transportation. As Sundberg observes, therefore: "On points not covered by unified rules [of the Convention] one would then expect to find conflicts of law rules. The Warsaw Conference, however, agreed upon conflicts of laws provisions only in five special cases. . . . The discrepancy is explained by the utter hostility which was displayed by

the Conference relating to conflicts of laws solutions."[18] With this "basic tenet" in mind, the Conference drew the Convention "in French with a single copy". (Article 36.) The Statutes at Large for 1934 indicate that it was the French text to which the United States adhered in the instrument the United States deposited in the archives of the Ministry for Foreign Affairs of Poland. 49 Stat. 3013 (1934).[19] The binding meaning of the terms is the French legal meaning. "The principle of the primacy of the French legal system thus means a harmonizing construction of the Convention." This principle should not be carried to extremes, but "[u]niformity may be maintained without many futile disputes as to whether, why, and when resort to the teachings in Paris should be made." The necessity for maintaining uniformity, even when the Convention is applied in a country, such as the United States, having a doctrinal basis for its legal system different from civilian systems, compels a broad construction of the Convention.

III.

The Warsaw Convention does not expressly mention charters or charter flights. The plaintiffs argue that even if there is no specific provision excepting the charter flights from the coverage of the Warsaw Convention, the Convention still does not apply to the Air France-Atlanta flight because coverage is premised upon a direct contractual relationship which, the plaintiffs contend, does not exist here. The gist of this argument is that Article 1 refers only to "transportation . . . according to *the* contract" between the parties; that the Warsaw Conven-

[18] The quotations in this paragraph are from Sundberg 242-249.

[19] However, on June 15, 1934, the text that was read to the Senate, and to which the resolution of ratification was directed, was a text in English originally published in a Treaty Information Bulletin of the Department of State in March 1934. 78 Cong. Rec. #115 77-82 (1934).

ion assumes the existence of an ordinary two-party contract of carriage between the airline and the passenger; that since this flight resulted from a charter between Air France and the Atlanta Art Association, the requisite contractual relationship between the airline and the passengers does not exist.

The applicability of the Convention undeniably is premised upon a contract, but on a contract of a particular kind. It is based on a contract of carriage that arises from the relationship between a "carrier" and the passengers.[20] This contractual relationship requires only that the carrier consent to undertake the international transportation of the passenger from one designated spot to another,[21] and that the passenger in turn consent to the

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[20] Lureau, La Responsabilité du Transporteur Aérien 84 (Paris 1961); Calkins, The Cause of Action Under the Warsaw Convention, 26 J. Air L. & Com. 217, 219-20 (1959); Riese and Lacour, Précis de Droit Aérien 233 (Paris 1951); Goedhuis, National Airlegislations and the Warsaw Convention 133 (The Hague 1937); Sullivan, The Codification of Air Carrier Liability by International Convention, 7 J. Air L. & Com. 1-2 (1936); Coquoz, *supra* note 16, at 68, 99.

[21] "The draftsmen of the Convention intended to create a right of action based on the contract of carriage, . . . Even a cursory reading of this text will convince the reader that the French law of contractual liability of the carrier was intended to be the governing basis of the convention. Thus Article 21 establishes the period during which the convention is to apply. . . . Article 26 also demonstrates that a contractual right of action under the convention was intended. The first clause of the paragraph reads—'in case of accident, loss, damage or delay, the liability action may not be instituted against the carrier except *on the basis of this convention.*' (Emphasis supplied). Outside rights in tort were excluded subject to one exception. This is found in the material which immediately follows in draft Article 26. Today we refer to it as the 'willful misconduct' provision, which makes inapplicable only such provisions of the Convention as exclude or limit liability. In this draft, however, it was quite clear that all claims were to be under the convention unless the damage arose from an intentional and illegal act as to which the carrier was liable. In short, actions arising out of willful misconduct of a carrier were to be based on national law rather than on the contract. . . . The goal of unification was sought with unremitting zeal—that the intent was to supply that unification by a contractual right of action under which liability was not to be ab-

undertaking. In a charter situation the passenger's cause of action under the Warsaw Convention is based on this contract of carriage (the sale and purchase of transportation), not on any tort theory.

We look now to the role contract plays in achieving the objectives of the Conference. We note, in passing, that the underlying concepts are civilian in origin and that much of the difference in views among the jurists on Citeja and the delegates to Warsaw is attributable to the conceptual differences in the laws of France, Italy, Germany, and the Scandinavian countries,[22] to say nothing of the difference between the civil law and the common law.

(Footnote continued)

solute in case of non-performance, but measured by the negligence of the carrier." Calkins, *supra* note 20, at 217, 218, 223, 236.

The Code Civile of France defines a contract simply:

"Art. 1101. De contrat est une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelque chose." ("A contract is an agreement by which one or several persons bind themselves towards one or several other persons to give, to do, or not to do a certain thing." Cochard tr.)

"Art. 1108. Quatre conditions sont essentielles pour la validité d'une convention:

Le consentement de la partie qui s'oblige;
Sa capacité de contracter;
Un objet certain qui forme la matiére de l'engagement;
Une cause licite dans l'obligation." ("Four conditions are essential to the validity of a contract:
The consent of the party who binds himself;
His capacity to contract;
A special object forming the substance of the agreement;
A licit cause for the obligation." Cachard tr.)

[22] There may be as great a difference between the laws of France and Italy as between the laws of France and the United States. Generally speaking, the civilian countries, whether or not by codified law, have tended toward defined categories of contracts. The term "charter" is not a civilian term. It may designate a variety of innominate legal relationships which do not fit very well into classic civilian categories. If a charter is a lease, the lessee (charterer) has the burden of tort liability; if it is a contract of carriage, the carrier has the burden. See Riese, Luftrecht 408 (1949); Sundberg 136.

According to the law of France and of many countries negligence in carriage is not tortious harm but a contractual breach. "Contractual liability is founded in the non-performance of the obligations flowing from the contract of air transport in which third persons

Appendix C

A. It is clear that the framers did not intend to endorse or encourage bargaining between the parties.[23] The Convention assumes the passenger's inadequate ability to bargain.[24] The Conference debates contain many allusions to the bargaining weakness of the passenger.[25] Within the context of the Convention the only issue which the parties are permitted to negotiate is the *raising* of the liability limitation, and here the Convention does not refer to "the contract" as it does in thirteen other provisions but rather speaks of a "special agreement" or, in the original and official French version, a "convention spéciale".[26]

(Footnote continued)

have or possess the status of simple contracting parties and the carrier undertakes to carry the passengers or merchandise with absolute security throughout the journey. Such obligation even without being specifically stipulated subsists, and in case of non-performance places the carrier in the role of a contractual debtor and the passenger as his creditor." Rigalt, Principios de derecho Aero 124 (1939). See Calkins, *supra* note 20; note 22.

[23] Articles 1(2), 1(3), 3(2), 4(4), 5(2), 11(1), 12(1), 14, 18(3), 22(1), 23, 28(1), 30(1), 32, 33.

[24] See Article 23: "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention."

[25] See, for example, the comment of Georges Ripert of France: "Well, then, in reality, this convention creates, against the air carrier, an exceptional regime, for, in most of the countries of the world, the contracts of transport are concluded under the regime of freedom. The carrier is free to insert in the contract clauses which exclude or diminish his responsibility, for merchandise as well as for passengers. You can imagine that they did not fail to do it, and presently many aerial navigation companies operate under this regime of contractual freedom and, in practice, in fact, they are not liable." II Conférence Internationale 32-33.

See also statements by Sabanine of Russia, p. 27; Riese of Germany, p. 85; Ripert, pp. 86-87.

[26] Article 22(1): "Toutefois par une convention spéciale avec le transporteur, le voyageur pourra fixer une limite de responsabilité plus élevée."

Appendix C

Since the Convention does not anticipate bargaining between the two primary parties, it does not limit participation in the negotiation of the contract to these two parties.[27] Thus the Convention refers to the existence of a contract in many places, but it never once describes this contract solely in terms of the passenger and the carrier. There is no Warsaw objection therefore to a third person acting as agent of passengers or entering into a contract with the carrier for the benefit of passengers ("stipulation pour autrui").

The plaintiffs make much of the fact that Article 1(2) does contain a reference to "*the* contract made by the parties". But this reference is in a provision defining "international transportation", for purposes of the Convention, as being dependent upon the places of departure and arrival agreed to by the parties. The object of this requirement is that the applicability of the Convention to the flight be known in advance and not be dependent upon the place where the plane might happen to crash-land. In its English translation Article 1(2) reads as follows:

> (2) For the purposes of this convention, the expression "international transportation" shall mean any transportation in which, *according to the contract made by the parties,* the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there

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[27] "One must consider as an airplane passenger the person whom the carrier has engaged, by means of a contract of transportation, to carry from one place to another on an airplane. Thus, the stowaway could never be termed a passenger . . . and demand that the Warsaw Convention be applied. *It is not indispensable that the passenger have figured personally as a contracting party. The contract could have been concluded in his favor by a third party.*" See Coquoz, *supra* note 16, at 87. (Emphasis supplied.)

> is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention. (Emphasis added.)[28]

This is a poor translation of the original and official French version, which also states that both parties need agree to the stopping places but which does not assert or imply that this agreement need be made as part of a single and direct contract. Instead of the language, "according to the contract made by the parties", the French version reads "d'après les stipulations des parties". Thus the French version refers to the *stipulations* (conditions) agreed to by the parties rather than to "*the contract* made by the parties". The French version therefore would

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[28] "2) Est qualifié 'transport international', au sens de la présente Convention, tout transport dans lequel, *d'après les stipulations des parties*, le point de départ et le point de destination, qu'il y ait ou non interruption de transport ou transbordement, sont situés soit sur le territoire de deux Hautes Parties Contractantes, soit sur le territoire d'une seule Haute Partie Contractante, si une escale est prévue dans un territoire soumis à la souvernaineté, à la suzeraineté, au mandat ou à l'autorité d'une autre Puissance meme non Contractante. Le transport sans une telle escale entre les territoires soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité de la meme Haute Partie Contractante n'est pas considéré comme international au sens de la présente Convention." *Cf.* "Paragraph 2 of article 1, in its reference to 'the contract made by the parties' means, obviously and on its face, not that the convention applies only when the parties contract for its application, but that it applies (unless by special arrangement otherwise) whenever, 'according to the contract made by the parties,' the place of departure and the place of ultimate destination are within the territories of two of the 'High Contracting Parties' or both within the territory of a 'single High Contracting Party' with certain agreed stopping places elsewhere. Put another way, that means that the Convention becomes the law of the carriage when the 'contract' of the parties provides for passage between certain described termini. When such is the contract, then the Convention has automatic full impact, by its own terms and not because the parties have so agreed." *Ross v. Pan American Airways*, 1949, 299 N. Y. 88, 85 N. E. 2d 880, 885.

include the situation where both main parties agree to the same route but do so through a third party such as the Atlanta Art Association.

It is also clear that by referring to a contract the Convention does not intend to establish the prerequisite that consideration, *in a common law sense,* must flow both ways between the two parties before their relationship can come under the Convention's control. Even if the passenger should make no promise to pay there would still be a contract of transportation, supported by cause, *in a civilian sense.*[29] Article 1(1) explicitly declares that the Convention "shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise."[30] Therefore, all that is needed to establish the requisite contract is a promise, an undertaking, on the part of the carrier to transport the passenger, and the consent of the passenger.

The contract plays a role fundamental to the objectives of the Warsaw Conference. The obligations arising from the contract between the carrier and the passenger carry out the Conference goal that the rules of limited liability be known to both parties.[31] This knowledge enables the passenger to determine in advance the amount of in-

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[29] "In gratuitous contracts, the intention to exercise an act of liberality or to render a service, constitutes a sufficient cause of engagement". Aubry and Rau, Cours de Droit Civil Francais IV, Obligations, §345 (6th ed. La. L. Inst, tr. 1965).

[30] The object was to exclude the application of the Convention to casual, isolated flights when a free ride is afforded by an owner not engaged in the business (enterprise) of flying.

[31] "It is the will of the parties, and not the route actually taken by the plane, which constitutes the determinative element for the classification of the flight. This prescription possesses, for the parties involved, the appreciable advantage of settling in advance the application of the Warsaw Convention, thus becoming independent of fortuitous events. Coquoz, *supra* note 16, at 96.

See also *Grein v. Imperial Airways, Ltd.*, Ct. App. England 1936, 1 Avi. 622, 635; Calkins, *supra* note 20, at 262; Juglart, Traite Elementaire de Droit de Aérien 319 (Paris 1952); Goedhuis, *supra* note 20, at 21; Sullivan, *supra* note 20 at 6.

surance he needs;[32] permits the carrier's insurer to gauge the carrier's long-term risk, and act accordingly;[33] and, finally, advises the carrier as to what law it need conform its transportation documents. This rationale—that the flight arrangements must be based upon an agreement because only in that way can the necessary knowledge or foreseeability be achieved—implies that as long as there exists an agreement between the carrier and the passenger as to transportation and as to places of *departure* and *arrival,* any agreement between the owner-carrier and a third person, the charterer, is irrelevant to Warsaw purposes.

The common denominator of all Warsaw contracts of carriage is the consent of the carrier to transport the passenger (or goods) and the consent of the passenger (or shipper) that the transport take place. "The contract of carriage represents the sale and purchase of transportation of persons and goods, i. e. an obligation to carry passengers or goods from one place to another."[34] For this reason a stowaway injured in a plane accident may not recover against the carrier under the Warsaw Convention.[35] This fundamental role of consent as a prerequisite to the conclusion of a contract of transportation is emphasized in the Convention by Article 33: "Nothing contained in this convention shall prevent the carrier . . . from refusing to enter in any contract of transportation."

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[32] See *Lisi v. Alitalia-Linee Aeree Italiana S.p.A.*, 2 Cir. 1966, 370 F. 2d 508; *Warren v. Flying Tiger Line*, 9 Cir. 1965, 352 F. 2d 494, 497; *Mertens v. Flying Tiger Line*, 2 Cir. 1965, 341 F. 2d 851, 856-57. *Cf.* Gardner, Some Legal Advice: So you're going to fly to London, 43 A.B.A.J. 412 (1957).

[33] Report of the Secretary of State, Cordell Hull, to the President of the United States, Franklin Delano Roosevelt, 1934 U.S. Av. Rep. 240, 242; Ide, The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.), 3 J. Air L. & Com. 27, 29-30 (1932).

[34] Crönfors, Air Charter and the Warsaw Convention 60 (The Hague 1956). See also Riese, *supra* note 22, at 246-47.

[35] Riese, *supra* note 22, at 233; see note 27.

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To sum up, for a flight to come within the scope of the Warsaw Convention, the carrier must have agreed to carry the passenger, and both the carrier and the passenger must have consented to the particular route. If the carrier is an "air transportation enterprise" the passenger need not have paid or have promised to pay, provided that the carrier has consented to transport the passenger under those conditions. Finally, the passengers and the airline need not have been in a position where they could bargain over the terms of carriage.

The existence of the airline-passenger relationship is not destroyed by the fact that a third party negotiated the agreement and signed the charter. A fortiori, the airline-passenger contract exists when the negotiator is only a nominal party, acting on behalf of the passengers.[36] Nor is the airline-passenger relationship destroyed by the fact that in certain circumstances and in accordance with the law of certain countries, the charterer may be treated as the carrier in determining *its* liability.

B. The fatal flight developed out of three sets of contractual relationships: first, the relationship between Air France and the Atlanta Art Association, created by their

[36] The plaintiffs contended below that there must be a direct contractual relationship between the carrier and the passengers for the Convention to be applicable. Article 8(f) of the charter describes the Association as acting "on his own behalf and as duly authorized agent of all passengers". Judge Lewis R. Morgan held that: "No such direct contractual relationship is required by the Convention, and in any event the direct contractual relationship existed here. ¶The provision of the International Charter Flight Agreement that the Charterer acted as agent for the passengers was required by the CAB pursuant to statute. . . . [T]he Atlanta Art Association, an association not engaged in transportation directly or indirectly, could obtain group rate transportation for its members, if the charter is made by the Association as an agent for the passengers, and the Flight Agreement in this case was made in compliance with that rule of the CAB. Without such an arrangement, under its rules, the CAB would have disapproved the Charter Flight Agreement here involved. . . . When the Atlanta Art Association, through its president, executed the International Charter Flight Agreement as agent for the passengers, a direct relationship arose between Air France and each passenger." 227 F. Supp. at 806.

"International Charter Flight Agreement"; second, the more informal set of relationships between the Art Association and the individual passengers; and third, the relationships between the individual passengers and Air France, concluded by the airline's delivery to each passenger of a personal ticket for the flight.

The initial arrangements for the charter flight were made in the "International Charter Flight Agreement" dated February 2, 1962, and the supplementary "Schedule A" dated January 8. At the heart of these two documents was an agreement for Air France to furnish a Boeing 707 jet with a 140 passenger capacity in return for a payment by the Art Association of $36,000. The flight was scheduled to leave for Paris May 9, 1962. The Art Association had the right to cancel the contract unconditionally up to 25 days before that date. If the Association cancelled after that date, it would have to pay Air France a cancellation fee of $3,600, ten per cent of the charter fee. Air France had the right to cancel at any time, subject only to the duty to return that portion of the fee equal to the proportion of the miles not flown.

Under the terms of the agreement the Art Association had no control over the physical conduct of the flight; anything concerning the operation of the plane was the responsibility of Air France.[37] Although the Art As-

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[37] "Article 3. Costs. All expenses for fuel, oil, crew salary and crew expense and landing fees for the aircraft will be for the account of AIR FRANCE. All other expenses in connection with the charter flight, including transportation sold thereon, costs for visas, customs inspection fees, customs duties and other taxes payable in connection with the passengers, baggage and cargo transported, shall be for the account of the Charterer. . . .

"Article 4. Operation, Interruption or Cancellation of Flight. (a) AIR FRANCE shall have exclusive control over the aircraft chartered hereunder and reserves the rights, in its sole discretion, to determine the route to be flown and airports to be used; to limit, for operational reasons, the number of passengers and the weight, size, type, contents and value of baggage and cargo. . . . (c) The captain of the aircraft shall have complete discretion concerning

sociation was to obtain the passengers for the flight, its choice of passengers in no way bound Air France.[38] Thus even if a person had paid the Art Association the price of the full fare, that person had no right to a place on the flight. That right came into being only by the act of Air France in issuing, in the passenger's name, an ordinary airline ticket. The ticket itself was not the contract but its issuance evidenced the contractual relationship between the passenger and Air France.

The charter agreement contained the following provision:

> "Article 8. Liability
>
> (a) Carriage furnished herein is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, Poland, October 12, 1929 (hereinafter called 'Warsaw Convention'), unless such carriage is not 'International Carriage' as defined by said Warsaw Convention."

Essentially the same provision was contained in the boiler plate "conditions of contract" on the reverse side of each

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(Footnote continued)

the load carried and its distribution and the manner of its stowing and discharge, as to whether or not a flight should be undertaken, and as to where landing should be made and the Charterer shall accept as final all such decisions of the captain, but neither the captain nor AIR FRANCE shall incur any liability as a result of the exercise of such discretion. (d) The operating personnel are the servants or agents of AIR FRANCE and shall remain at all times under the exclusive control of AIR FRANCE. They are authorized to take orders only from AIR FRANCE unless specific agreements have been made in writing between the parties hereto whereby they may accept certain defined instructions from charterer."

[38] "Article 6. Carriage of Passengers, Baggage and Cargo. Charterer shall not permit any passenger to be carried unless such passenger has been issued a ticket by AIR FRANCE, nor permit any baggage to be carried unless AIR FRANCE has issued a baggage check therefor."

"ticket". In Article 6 of the agreement Air France agreed that it would "be bound by the terms and conditions of said Air France tickets". The provision further states that the tickets created a direct cause of action in the passengers against Air France. "Any action taken by Charterer with respect to said tickets . . . shall be deemed to be taken as agent for the passenger. . . ." Before the tickets were issued, and despite the existence of the charter agreement, Air France had no obligation to carry any individual passenger.

The contractual relationship established between Air France and the passengers and evidenced by the individual issuance of these tickets fits the description of the relationship required by the Warsaw Convention. First, Air France was in no way deprived of its freedom to contract, referred to by Article 33 of the Convention. Second, Air France, owner and operator, agreed to the carriage of each individual passenger. Third, Air France agreed to the route to be followed, evidenced by the tickets, thus accepting the route already agreed to by each passenger.

The only difference between this charter arrangement and the arrangements for an ordinary commercial flight is that in the present case payment for the transportation was indirectly routed through the Atlanta Art Association. However, since the Convention applies even to gratuitous transportation, there is no reason why a contract should not exist when the payment is indirect but comes from the passengers.

IV.

The plaintiffs assert that any ambiguity in the Convention itself is dispelled by the history of the treaty which allegedly proves that the framers intended to exclude charter flights. We find a good deal of disagreement and

uncertainty whether certain charter arrangements come within the scope of the Convention. We do not, however, find any substantial evidence to the effect that *all* charter flights—whatever their nature and whatever the relationship between the passenger and the carrier—were, as the plaintiffs contend, intentionally excluded from the scope of the convention.

A. The court below refused to consider the legislative history of the Convention on the ground that the language of the Convention was "unambiguous". We feel, however, that the determination in an American court of the meaning of an international convention drawn by continental jurists is hardly possible without considering the conception, parturition, and growth of the convention.

The American Law Institute Restatement of the Foreign Relations Law of the United States gives the following blackletter rule for interpreting an international agreement:

> "§149. Basic Function of Interpretation.
>
> The extent to which an international agreement creates, confirms, modifies or terminates relationships under international law is determined in case of doubt by the interpretation of the agreement. The primary object of interpretation is to ascertain the meaning in which the [high contracting] parties have used the terms in which the agreement is expressed, having regard to the context in which they occur and the circumstances in which the agreement was made. This meaning is determined in the light of all relevant factors."

Section 150 of the Restatement lists the following relevant factors, among others, to be taken into account, "by way of guidance in the interpretative process"; the ordinary

meaning of the words in the context in which the words are used, the title and statement of purpose, the negotiation of the agreement, drafts and records of deliberations, negotiating history, a party's unilateral statement of understanding, the subsequent practice of parties, change of circumstances relating to performance, compatibility with international law and general law. Similarly, the Harvard Research in International Treaties, 29 Am. J. Int. L. Supp. 937, 938 (1935), states:

> "The historical background of the treaty, *travaux préparatories,* the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve. . . . All that can be said is that all of them are or may be significant in arriving at a sound interpretation in a particular case, and that none of them should be overlooked by the person charged with interpreting the treaty. Each of them may contribute in some measure to giving an accurate and complete 'picture' of the treaty in its setting, and it is only when so viewed that its general purpose can be fully comprehended and intelligently effectuated. Only then can one undertake to say what the treaty 'means'."

See, also Hyde, International Law Chiefly as Interpreted and Applied by the United States 1481 (Rev. ed. 1945); Lauterpacht, The Development of International Law by the International Court 124-27 (1958).

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"In its long experience as an interpreter of treaties the Supreme Court has maintained a record singularly free from the manifestation of a sense of obligation to exclude or ignore the probative value of evidence at variance with what the form of a text would appear to entail." Hyde 1481. The Supreme Court itself has said: "Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians v. United States,* 1943, 318 U. S. 423, 63 S.Ct. 684, 87 L.Ed. 889. See also *Arizona v. California,* 1934, 292 U.S. 341, 54 S.Ct. 735, 78 L.Ed. 1298; *Cook v. United States,* 1933, 288 U.S. 102, 53 S.Ct. 305, 77 L.Ed. 641; *Nielsen v. Johnson,* 1929, 279 U.S. 47, 49 S.Ct. 223, 73 L.Ed. 607. Speaking of the "plain meaning" canon, as applied even to a statute, the Court has said:

> "When aid to construction of the meaning of words as used in the statute is available, there certainly can be no 'rule of law' which forbids its use, however clear the words many appear on 'superficial examination'." *United States v. American Trucking Ass'n,* 1940, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345.

A multilateral treaty is rather like a "uniform law" within the United States. The Court has an obligation to keep interpretation as uniform as possible. To fulfill that obligation and follow the consensus as to construction, the Court should resort to legislative history and to relevant extrinsic aids.

B. Changes in the draft conventions indicate that, although the Warsaw Convention was the first of its kind and did not purport to codify air law, *the terms* of the

Convention should be applied broadly. Article 1(1) of the De Vos draft originally read as follows:

> "This Convention shall apply to international transportation of passengers, goods and baggage performed by aircraft for hire or by an air transportation enterprise with or without remuneration."

It remained unchanged until after the Conference rejected a Brazilian proposal that "carrier" be defined. See Section IV D of this opinion. The Conference then added the word "tout" (all) and a second sentence. As adopted Article 1(1) reads:

> "(1) This convention shall apply to *all* international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise."

Although the final draft retricted "international transportation" to transport between places in countries which were parties to the Convention, Citeja, commenting on Article 1(2), said:

> "The definition of *international* transportation has been made broad, so that a transportation whose place of departure and place of destination are situated in the same country, is still considered as international, if a stopping place is provided in another country, even a non-contracting one." (SJ-X6, p. 411)

The British delegation proposed that Article 1 of the draft be amended by adding a provision that "transportation between territories subject to the sovereignty or the authority of the same High Contracting Party shall not be deemed to be international for the purposes of this Convention". Such an amendment would mean

that the Convention would not apply to flights within the British Empire. Sabanine, The Russian delegate, opposed the amendment.

> "By coming to this Conference, the Soviet Delegation had as its mission to defend, as far as possible, the application of the terms of the Convention *to all cases, without exception,* of international commercial air transportation."

The Conference defeated the British proposal, consistent with the general objective that the terms of the Treaty should apply broadly.

C. The plaintiffs point to the official title of the Convention—the "Convention for the Unification of *Certain* Rules Relating to International Transportation by Air". They contend that in general it reflects limited ambitions on the part of the drafters and the High Contracting Parties; that in particular the omission of any referee to charters showed an intention that the Convention should not apply to any charter or charter flight.

There is support for this view in post-Warsaw decision of Citeja in the thirties to defer a convention on air charters as premature: (1) international charter flights were then still uncommon and (2) the legal problems created by the charters were so complex that a convention could not be drafted without first completing an exhaustive study of the subject. However, this view assumes that a convention would have to cover *all* types of air charters and the varying legal effects of the relationships of owner to charterer and of charterer to passenger. It ignores the position of a number of Citeja members and others who assumed the applicability of the Warsaw Convention to the contract of carriage resulting from voyage charter. It overlooks the common

practices of airlines, as evidenced in charter forms and transportation documents. It underestimates both the vision of the men who drafted the convention and the tenacity with which they held to their objective of creating uniformity in the area of the carrier's responsibility to its passengers and shippers.

The general attitude at the Conference which produced the Convention was not one of caution and fear of change. On the contrary, the participants accepted head-on the challenge to create a body of legislation that could keep pace with the rapid development of air transportation itself. De Vos, Reporter for the draft presented to the Convention, expressed this sentiment in his introductory speech:

> "These are the essential traits of the draft of Convention submitted to you. As I said before, time has come to materialize. The air carriers expect of us that we give them and the underwriters the juridical base of their exploitation. Their transports are daily taking on unexpected proportions; in my country alone, at one single airport, in the summer season, there are up to 36 daily flights of regular airlines. The aircraft goes faster and faster every day so that the Fokkers, the Farmans shall soon appear to be tools of olden days. We still have in our ears the deafening sound of the supermarine which just won the Schneider cup, with a speed of about 600 kilometer (375 miles) an hour, and we have before our eyes the colossal spread of the Do-X which, on Lake Constance, has just demonstrated the possibility that tomorrow, in all countries, intrastructures shall be established for day and night flights. *What engineers are building for motors, we, jurists, must do for the code.*"[39]

[39] II Conférence Internationale 17.

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Later in the proceedings the Polish delegation submitted a proposal that the drafters include a provision establishing a schedule for periodic revision of the Convention. This proposal was rejected. Amendee Giannini, head of the Italian delegation and president of the commission which prepared the draft presented to the Warsaw Conference, spoke in his introductory remarks against this proposed provision, complaining that in effect it would be a declaration that the Convention was "merely a first attempt at codification, a first effort to codify air law . . ." and that if this provision were inserted in the Convention the drafters would be establishing "the principle that this first effort we are making today is not definitive."[40]

Werlich, one of the two American observers at the Warsaw Conference, said: "My understanding of the purpose of this Conference is to draw up a convention which, although it may not cover all the more important relations between passengers or shippers and the transporter in commercial air traffic will at least give the fundamental relations on which such commercial air traffic can be carried on."[41] In *Garcia v. Pan American Airways, Inc.*, 1945, 55 N. Y. S. 2d 317, 320, 269 App. Div. 287, aff'd, 295 N. Y. 852, 67 N. E. 2d 257, cert. den. 329 U. S. 741, 67 S. Ct. 79, the Court read Article 1 as stating: "The framers of the Warsaw Convention sought to effectuate the provisions of the compact, inclusive of the provisions specifically referred to, within as wide a scope as practicable in the light of the fact that its high contracting parties did not include all the powers of the world."

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[40] *Id.* at 23. See also Flandin, France, *id.* at 28.

[41] Werlich, Report to the State Department, Archives 579.6L-2/34-35, pp. 1-5.

On the other hand, the Warsaw Convention was certainly not intended to cover all the problems arising in international transportation. As Secretary of State Cordell Hull wrote to President Franklin Roosevelt March 31, 1934:

> "This Convention constitutes the first of a series of conventions on various subjects of private aerial law which have resulted or will result from the deliberations of the International Technical Committee of Aerial Legal Experts (Citeja), an international organization engaged in the preparation of a code of private air law through the adoption of draft conventions on which final action is taken at general international conferences called for the purpose of considering the drafts."[42]

Ide, the other official American observers cites as an example of one subject not covered at Warsaw, the liability of air carriers for damage caused to third parties on the ground. Damage to third parties was originally to be discussed at the Warsaw Conference but because of a failure to reach an agreement on certain points the subject was set aside. Ide, The History and Accomplishments of the International Technical Committee of Aerial Legal Experts [Citeja], 3 J. Air L. & Com. 27, 38-39 (1932). The subject was brought up, however, at the next International Conference, and damage to third parties became the subject matter of the Rome Convention of 1933. Other examples of subjects Citeja studies in 1929 which were not discussed at Warsaw, were the establishment of an aeronautical registration system for registering the ownership of all airplanes; mortgages and aerial liens; the legal status of the commanding officer of an aircraft; and the problem of rescue at sea. Ide,

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[42] 1934 U.S. Av. Rep. 240, 241.

supra, at 40. Clearly, therefore, certain subjects were purposely not covered by the Convention, as is evident from the limitation express in the Convention's official title. The Convention was concerned primarily with the uniform rules for dealing with transportation documents and the liability of the air *carrier* to its passengers for injury or loss.

D. Only once during the Warsaw Conference were charters mentioned. That was in a proposal by the Brazilian delegation to define the word "carrier" in the following terms:

> "The carrier shall be considered the person who owns, charters or manages an aircraft, uses it individually or jointly in the transportation of persons and goods, within the meaning of this convention, and in conformity with national regulation."[43]

[43] The Brazilian delegation's statement in support of this proposal reads as follows: "Since the status of the air transportation operator differs, due to the inherently international character of aircraft, from rules relating to the captain in merchant marine, and the boatman in river navigation, or to the carrier in overland communication, it would be useful for this designation to assimilate the multiple concept as to his responsibility. ¶This is all the more necessary, as the word carrier, so adequate to the end of its destination, nonetheless does not correspond exactly to most designations used in the laws of different countries. It is used neither by the French texts of most international conventions, nor in the draft concerning liability for damages caused to third parties, presented in May by Mr. Ambrosini, who merely refers to the owner and operator of the aircraft. ¶If it is wished that the carrier be the air transportation entrepreneur or its exploiter, in the meaning of economic control of the craft and established by German, Swiss, Hungarian, Dutch jurisprudence, etc., or that he should be the one for whose account the aircraft is exploited, according to Danish law; and if it is wished to conform to the convention the concept of solidarity provided by the Polish Law, art. 71, between the owner and the carrier, or that of Brazilian law, between the pilot and the shipowner. ¶If it is wished to bring closer to the general formula the English concept of hire, in air transportation, characterized by the period of contract, which concept exists in the laws of many states of North America . . . this goal could be achieved by qualifying the carrjer on an equality with the transport." II Conférence Internationale 97; SJX4, p. 2; JX6, p. 235.

This proposal would have brought all air charters within the scope of the Convention and made the charterer jointly liable with the owner. Giannini expressed the sentiment of the Conference: the matter was beyond the realm of the Convention. He stated:

> As far as this Brazilian proposal is concerned, the Commission felt that this problem was outside the realm of the convention. Since, in this Article, we have made statements and definitions for practical reasons, that is to say that the codification of private air law is made progressively, we have to anticipate a bit, we have examined certain problems which touch upon other conventions. But since in this case there was no necessity to define the carrier, we thanked our colleague from Brazil, who furnished a great effort, and we have referred his prospal to the C.I.T.E.J.A. for its consideration. Thus no decision has to be taken."[44]

The plaintiffs contend that the rejection of this proposal serves as a rejection of any connection between the Convention and charter flights. We do not agree with this interpretation. What the Brazilian proposal recognizes is that in some circumstances a problem will exist as to *who is the carrier for Warsaw purposes.* The explanatory note accompanying the proposal points out that according to the law of several countries certain charter arrangements would create a joint liability between the airlines and the charterer or would even thrust the whole liability upon the shoulders of the charterer itself. In presenting the proposal the Brazilian delegation hoped to clarify once and for all who would be liable in such situations.

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[44] *Ibid.*

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The Conference did not give its reason for rejecting the proposal. Resolutions included in the Final Protocol noted that the Warsaw Convention regulated only "certain" questions relative to transportation, took cognizance of the Brazilian proposal "with respect to the definition of the carrier", adhered to the view that the question should not be settled in the Warsaw Convention, and referred the matter to Citeja for study.[45] The delegates may have decided (so De Vos thought) that it was better to leave the definition of "carrier" for the courts to work out in accordance with the general law of the forum.

It seems clear enough from the decision at Warsaw and, later, in Citeja meetings that the type of flight here the subject of this litigation would have raised no doubts in the minds of the Brazilian delegates. Here the Art Association could not qualify as the carrier. Air France was in total control of the flight. Air France was the only party in a position to comply with the formal and documentary requirements of the Convention. And Air France had assumed all the obligations of a contract of carrier that it would have assumed if the flight had been of an ordinary commercial nature. The Atlanta Art Association had no contractually based responsibility towards the passengers for performance of the obligation to transport or for the safe conduct of the flight. By the terms of the charter, the Association was the agent of the passengers. Reduction of the charterer's role vis-a-vis the passenger, leading to the conclusion that in this country, when the charterer is only an agent, that the contract of carriage must be between the owner-operator and the passengers. The Atlanta Art Association could not have been the carrier. See footnotes 36 and 57.

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[45] *Ibid.*

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E. Mention of charter flights is made in the groundwork leading up to the 1929 Warsaw Conference, but here, too, the reference is to special problems that may arise in ambiguous charter situations, such as "who is the carrier" and what is the charterer's liability. At the First International Conference on Private Air Law held in Paris in 1925 a preliminary draft was presented to the delegates specifying nine topics to be considered. As noted earlier, one of these topics was "location d'aéronef" or "hiring of airplanes".[46] Citeja was created to make a detailed study of the draft and other problems that might arise. Citeja in turn established four commissions (sub-committees) and divided the workload among them. Among the five topics assigned to the Second Commission was "location des aéronefs".[47] May 1929, three years later and only five months before the Warsaw Conference convened, the question of "location des aéronefs" was raised for a brief discussion, ending in a decision, urged by De Vos and others, to put it aside for a later date. [48]

The plaintiffs contend that by tabling the question the members of the Second Commission and, later Citeja itself, expressed the intention to kept charter flights outside the regime of the Convention. Minutes of the Second Commission meetings prior to the 1929 Warsaw Conference are not informative; minutes of the later meetings in which the delegates addressed themselves in more detail to the issue of "location des aéronefs" are more useful.

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[46] Archives 579.6L1/24.

[47] Minutes and Reports of the first session of Citeja, Archives 579.6L1A/22 1/2 at p. 26.

[48] Archives 579.6L1A/84.

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These post-Warsaw meetings show a concern, similar to that expressed by the Brazilian delegation, as to whether charters, not charter *flights*, are covered by the Convention. As Drion pointed out in his book, Limitations of Liability in International Air Law 133 (The Hague 1954):

> "The *Warsaw Convention* does not contain any definition of who is to be considered a 'carrier'. An attempt by the Brazilian Delegate at the Warsaw Conference to insert a definition, mainly to take care of the problems arising under charter agreements, failed to receive support, so that one must now distil the meaning of the word from the wording and system of the Convention itself. . . . The main choice is between the following possibilities:
>
> (a) carrier is he who has concluded in his own name a contract for the carriage of passengers or goods [or]
>
> (b) carrier is he who actually performs the carriage governed by the Convention."

In these meetings and subsequently, De Vos, the primary author of the Convention, consistently took the position that in air charter relationships there are two distinct contracts: "the contract which exists between the passengers and the carrier [which is regulated by the Convention] and another contract, which is the contract between the owner of the aircraft and the operator [or the charterer]. What is the situation in the second case? It should be examined in a separate convention."[49]

[49] Archives 579.6L1A/382.

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In 1932 Major K. M. Beaumont, representative of the International Air Traffic Association (IATA)[50] at the Warsaw Conference, attempted to review with certain delegates to the Conference the question whether the Convention was intended to cover air charters. He reported to IATA that the replies he received "seemed to indicate that the Government draftsmen responsible for the Warsaw Convention did not contemplate charter contracts coming within the provisions of the Convention at all, though they were unable to quote from the Convention itself any provisions which would have the effect of taking such hirings out of the obligations imposed on carriers by the convention. . . ." The IATA then directed a questionnaire to Citeja regarding the effects of the Convention on several types of charter and suggesting that Citeja consider whether it would be desirable to prepare an international convention on contracts of charter and lease of aircraft. The IATA asked whether, assuming that the Convention applied to some charter flights, the owner or the charterer was responsible for the application of the provisions of the Convention, including particularly those concerning transportation documents. The Secretary General of Citeja referred the questionnaire to De Vos, as Reporter for the Second Commission. Because of De Vos's having been the Reporter of the Convention, he questioned the propriety of his answering authoritatively in the name of Citeja questions from a private association. And he questioned the value

[50] IATA is an international association of airlines. As the plaintiffs point out, the association had, of course, an axe to grind. But see letter from Secretary of State Cordell Hull to President Franklin Roosevelt, dated March 31, 1934: "This Convention has been studied by the Department of Commerce, which advises adherence thereto by the Government of the United States. That Department has expressed the view that the provisions of the Convention are fair and afford protection to the air-transport operator as well as to passengers and shippers, and that if the United States fails to become a party the Convention, American air-transport lines operating on an international basis will be at a disadvantage while operating in countries that are parties to the Convention." 1934 U.S.Av. Rep. 240, 244.

of his individual opinion or even that of Citeja's in the interpretation of an international Convention. Nevertheless he added, "Having said this, I can give you my opinion on the matter". His letter succinctly states the case for construing the Warsaw Convention as applicable to the carrier (airline)-passenger relationship in a voyage charter flight, regardless of the inapplicability of the Convention to the relationships and liabilities of the owners, charterers, lessees, and others. In pertinent part, De Vos wrote:

> "The problems raised by the I.A.T.A.'s note are interesting, merit an examination and might form the subject of a special convention.
>
> But they do not challenge the provisions of the Warsaw Convention itself. The latter governs the relations between the party who assumes the liability for the transportation [the carrier] and the one who is transported [the passenger] or has something transported [the shipper].
>
> *Whether the party who accepts the transportation is the owner or simply the charterer—for a period of time or by the trip—the situation of the passenger (transporté) or the shipper will not be changed: their rights and their obligations continue to be determined by the articles of the Warsaw Convention.*
>
> The acts, the engagements of the owners and the charterer among themselves, are acts or engagements which do not bind the traveler or the shipper res inter alios acta.
>
> Conclusion: Side by side with the rules established by the Warsaw Convention on the carrier's

liability, there exists a matter connected with the contract of transportation concerning the relations between owners, charters, lessees, et cetera, which can and should, to my mind, constitute the subject of a thorough examination on the part of the C.I.T.E.J.A." (Emphasis added.)[51]

Major Beaumont and, of course, the airlines were especially interested in determining responsibility for the issuance of tickets and other transportation documents, wholly aside from the question of the respective liabilities of owner and charterer. In a report to the IATA in August 1933 Beaumont wrote:

> "The main difficulty is not to decide who has to be considered the 'carrier' for purposes of the Warsaw Convention in connection with charters. Usually the party who normally operates the aircraft will be the 'carrier'. The difficulty in such cases is a practical one—namely that of complying with the somewhat complicated regulations concerning Tickets, Baggage Checks and Consignment Notes when the aircraft is operated away from aerodromes where the operator has representatives who can attend to these formalities."

But on the question before this Court he saw eye to eye with De Vos:

> "The 'international carriage' referred to in the Convention is carriage of passengers, baggage

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[51] Defendant's Exhibit T-1, p. 2, Citeja Doc. 182; Archives 579.6L1A 339, 344. De Vos' answer to the 1932 IATA questionnaire was duly forwarded by the U.S. Embassy in Paris to the Secretary of State in Washington on December 8, 1932 (State Department file 579.6 L 1A/339; see Defendant's Exhibit 'T-2', pp. 1, 11, 12-17). It was translated by the State Department and an English translation of the De Vos answer was forwarded to the Secretary of Commerce on January 9, 1933 (State Department file 579.6 L 1A/344; Defendant's Exhibit 'T-2', pp. 20, 33-36)."

and goods for reward, and gratuitous carriage by an air transport undertaking. It appears to be clear that some contracts of charter and hiring must come within the meaning of this description." (1932 Report to IATA, Defendant's Exhibit U-1, p. 1.)

Thirty years later, Major Beaumont adhered to this opinion.[52] See also Shawcross & Beaumont, Air Law §§ 351(2), 359, (1951).

February 14, 1933, the IATA questionnaire and the De Vos letter came up for consideration at a meeting of Citeja's Second Commission. De Vos reaffirmed his views that the IATA seemed to confuse two different contracts, the one between the carrier and the passenger and the other between the owner and the operator (charterer); the second should be examined, if at all, in a separate convention. Professor Giannini of Italy argued that the "question consisted in seeing whether charter-parties should be introduced in air law . . . and what should be the relationship between the owner and the operator".[53] The Commission voted to refer the question to Citeja with the request that it be put on the Commission's agenda.

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[52] In 1963, by affidavit filed in the record, Major Beaumont expressed the opinion: "In a situation in which 'A' charters an aircraft from 'C' for the carriage of 'B' on a specific flight from the country of one High Contracting Party to the Warsaw Convention to the country of another High Contracting Party, with return to the country of the first High Contracting Party; where 'C', the air carrier, owns, operates and controls the aircraft and, prior to departure, delivers tickets (meeting the requirements of Article 3 of the Convention) to 'B' for that passage, the Warsaw Convention would be applicable (unless the flight was expressly excluded by Article 2 or Article 34 of the Convention, and 'B', the passenger or passengers, would be entitled to the presumption of liability contained in the Warsaw Convention as against 'C', and 'C', the air carrier, would be entitled to the limitation of liability also contained in the Convention as against 'B'. (Defendant's Exhibit "Q".)

[53] Archives 579.6 L 1A/382; Citeja Doc. 197.

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October 2, 1933, the Second Commission met and voted again to request Citeja to charge it with a study of the charter-hire question. De Vos declined to serve as Reporter for the project, "because of the preconceived ideas which he had expressed". The Commission selected first Hess and, later, Professor Pietro Cogliolo, to serve as Reporter. De Vos again expressed the view: "There are no grounds for an international convention. The regime of liability was not going to be altered according to whether it was the owner, the charterer or the operator who was in question: the regime was always the same. . . . Should Citeja be informed that this question did not seem to be material for an International Convention *although we would not refuse to study it*?"[54] (Emphasis added.) October 4, 1933, Citeja itself met and approved the decision of the Second Commission to retain the charter-hire question for study.

The minutes of the Second Commission meeting of February 26, 1936, show the breadth of the subject matter included under the heading "location des aéronefs". Cogliolo, the reporter for the topic, described to the meeting the questions he intended to cover, most of which dealt with the allocations of liability between the charterer and the airlines, and none of which justify a failure to apply the Warsaw Convention to the present case. The questions Cogliolo presented were as follows: (1) What are the obligations of the owner to the charterer; (2) Can the charterer assign the contract of charter; (3) Should there be special rules governing the leasing of aircraft; (4) Against whom do third parties have rights; (5) What is the effect of force majeure; (6) Who bears what expenses to keep the plane airworthy; (7) If insurance is obligatory, who should take it out; and (8) Whether charter contracts should be required to be en-

[54] Archives 579.6 L 1A/444; Citeja Doc. 205.

tered in the aeronautical register.[55] The plaintiffs emphasize certain selected statements of Cogliolo:

> "Therefore, the first problem to be settled is this: is there a right of action against the owner or not? The nature of the relationship which exists must be defined.
>
> Once one has established the nature of this relationship, a second question arises—that of the limitation of liability stipulated by the Warsaw Convention. Since the Warsaw Convention does not mention this case, does the limitation of liability apply when an aircraft is leased in accordance with the first hypothesis or the second hypothesis?
> . . .
>
> Do third parties have rights against the owner or only against the charterer? And again, in this case, is it necessary to state what rights the third parties have depending upon which one of the parties' hypotheses which we have contemplated is adopted."

The defendant observes that Cogliolo, like any good Reporter, explained that "in my report of February 1936 was a list of a considerable number of possible questions, which I presented solely for the purpose of bringing them to the attention of experts". It seems to the Court that, for purposes of this litigation, the Reporter's most important statement was:

> If the owner of the aircraft and the operator of the air carriage have hired out a given space in the aircraft to a third party, where the latter may place his goods, *but the carriage is nevertheless entirely controlled by the operator, this may*

[55] Archives 579.6 L 1A/1066; Citeja Doc. 297; SJX7-8.

constitute a form of air carriage and the Warsaw Convention therefore applies. (Emphasis added.)[56]

This statement referring to a "given space" (that is, less than the whole aircraft) was appropriate because the reference was to a shipment of goods. A passenger, of course, would be in the same position as a shipper.

In July 1937 the Second Commission met again to consider Cogliolo's second report. De Vos again expressed his belief that the Warsaw Convention governed the carrier-passenger relationship, and that the primary problem worthy of study was the relationship between the owner and the charterer. Cogliolo and others favored a broad, exhaustive study. The dominant feeling was that the subject was complex and at that time it was premature to regulate it by international convention.

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[56] Archives 579.6 L 1A/1302; Citeja Doc. 328, May 1937: SJX12. Cogliolo reported: "After the meeting of February 1936 I received valuable observations from several Experts. ¶Our colleague, Mr. Babinski (Poland), observed that from the international viewpoint, the important question was that of liability and that the rules of the contract for the hire of aircraft depended upon contracts concluded between the owner and the operator. In a possible revision of the Warsaw Convention the hire might be regulated and at any rate the contract of hire should appear on the aeronautic register. ¶Our colleague, Mr. Schonfeld (Netherlands), expressed the following opinion: separate regulations for the hire of aircraft are not necessary. According to the Rome Convention, the operator is liable for the damages to third parties and the 'fréteur' [charterer] is the operator. With respect to transportation, the Warsaw Convention may be amended, but it cannot be said to govern the contract of hire. The Hungarian Expert is of the same opinion and says that in Hungary, airplane hiring is not practiced. * * * * * There still remains the question of liability, and it is on that question that the CITEJA may formulate a few directive concepts which may serve for a possible, subsequent regulation. The directive concepts upon which our discussion may be carried on would be the following: 1. In the relations between the hiring owner and the charterer (conduttore) ** the national rules, civil and commercial, of the nation which is competent to pass on the contract are applied as far as possible. 2. International regulation of the liability may be made in two ways: either by a short international convention having a separate existence, or through an addition to the Warsaw Convention and with a broad interpretation of Article 4 of the Rome Convention. 3. In case the owner has leased the aircraft fully equipped, that is, with its own crew and with its own pilot, the owner is liable to the charterer,

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Cogliolo's report was never definitely considered by the Second Commission, owing to World War II and the events which led up to the war. After the war, Citeja removed all references to hire and charter from the general draft revision of the Warsaw Convention on which the Second Commission was working. Citeja assigned the study to the Third Commission. Dr. Jean Maniatopoulos of Greece, the Reporter, drafted a proposed convention bringing the hire and charter of aircraft within the Warsaw Convention. In his 1946 report he referred to "the possibility of applying the Warsaw Convention to contracts of hire or charter of aircraft". He stated:

"Charter must be considered in its two customary forms:

(Footnote continued)

unless the damages occurred through the act or the orders of the charterer. With respect to damages to third parties there is joint liability shared by the owner and the charterer. 4. If the owner has furnished the aircraft only, without crew or pilot, he is responsible only for damages arising through defects in the craft. 5. In the foregoing cases the Warsaw Convention cannot be applied, unless recourse is had to additions or amendments thereof in accordance with Article 41 of the said Convention. 6. If the owner and the operator of the aircraft have rented to a third party a certain space in the aircraft for him to deposit his merchandise, and if the transportation is entirely governed by the operator, there may be in such a case a form of air transportation and an application of the Warsaw Convention. 7. Contracts of hire, except those of simple transportation contemplated in No. 6, should be recorded on the aeronautical register. ¶A discussion by the Second Commission will be opportune on these points: indeed if not only myself but all our Expert colleagues have said that the rarity of the cases of renting aircraft renders international regulation of no urgency, that does not prevent it being a matter of great utility on the part of the CITEJA to discuss and determine a few fundamental and directive ideas."

The defendant contends that the first five statements relate to European charters where the charterer is not the passenger but may issue tickets to third parties in his own name, i.e. the charterer contracts with the passengers to transport them. CAB regulations forbid this practice. In effect, therefore, the Atlanta Art Association could act only as an agent. Indeed, the district court so held. 229 F. Supp. at 80. See fn. 36. The plaintiffs assert that the defendant is arguing, in its first reply brief, that the charter has faded out and that the charterer has become each passenger. Article 8(f) of the Charter Flight Agreement delineates the status of the Charterer: "This Agreement is entered into by the Charterer *both on his own behalf and as duly authorized agents* for all passengers."

A) charter for a given journey and

B) charter for a given period (Art. 7)"

"In principle, both forms are dealt with in the same manner. *However, in the case of charter for a given journey, where the charterer will be using the aircraft exclusively for his own purposes, the Warsaw Convention has been considered as applying.* This Convention has therefore been considered as applying generally, provided that all the requirements for its application are fulfilled." (Emphasis added.) CITEJA Doc. No. 423, plaintiffs' exhibits SJX 9, p. 3.

In 1947 Citeja was liquidated and replaced by the Legal Committee of the International Civil Aviation Organization (ICAO). The ICAO appointed a sub-committee, of which Major Beaumont was a member, to consider the need for an international convention on the charter and hire of aircraft. The sub-committee's report, presented at the International Conference at the Hague in 1955, contains the following statement:

"3. During the study of the problems which may raise in connection with hire and charter of aircraft, the Sub-committee considered that a special one arises under the Warsaw Convention. The Convention does not touch upon the question of the liability of the aircraft owner where damage is caused during international carriage *and the carrier is not the owner of the aircraft.*" (Emphasis added.) (SJX14, ICAO Doc. 7686/140, vol. 11 p. 115.

The inference one must draw is that the Sub-committee concluded that the Warsaw Convention applies when the carrier *is* the owner of the aircraft. The Note of the

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ICAO Secretariat, June 21, 1955, prepared for the Sub-committee had stated that in assessing the need for an international convention and in determining the problems to be solved, the Sub-committee would have to consider, among other problems, (1) the relationship *inter se* of the aircraft owner and the charterer and (2) the relationship of the owner to passengers. However, one of the conclusions of the Sub-committee's report was:

> "17. The relationship of the carrier to passengers, shippers, consignees and owners of baggage is, in the case of international carriage by air, affected by the Warsaw Convention which lays down liability rules in respect to such carriage."

The Sub-committee considered that its terms of reference called for an examination of all aspects of chartering, a task too complex to be attempted in the short time available before the Hague Conference. Instead it directed its attention to the single point whether a clause concerning charters should be inserted in the Protocol to amend the Warsaw Convention. The Final Act of the Conference states that the matter was too complex to permit the insertion of such a clause in the Protocol, but the subject should be further studied by the ICAO.

Mr. G. Nathan Calkins, Jr., Chief of the International Rules Division of the Civil Aeronautics Board, and head of the American delegation to the Conference, agreed with the position taken by the Conference. He too called attention to the fact that the Convention regulated the relationship between the parties in the contract of carriage.

> "Mr. Calkins (United States) said that there was no necessity for inserting additional provisions in

> the Convention for dealing with the various types of charter arrangements. The Warsaw Convention had been designed to deal with the *relationships between the parties to the contract of carriage* and, the Convention should not be extended beyond this. . . . As to cases falling within the generally accepted definition of a charter, he believed that the Convention now adequately regulated the relationships between the parties to contracts of carriage and if there were charter contracts which did not fall within the definition of a contract of carriage, they should be left outside the Convention." (Emphasis added.) SJX14, ICAO Doc. 7686/LC/140, vol. 1, p. 234.

The minutes of the next meeting of the ICAO Legal Committe, in Tokyo in 1957, seem like an abridged re-run of all the discussion of air charters that has occurred since the Warsaw Convention in 1929. SJX 14, ICAO Doc. 1721-LC/143-1. The Sub-committee on Hire, Charter, and Interchange of Aircraft in its report to the Committee showed concern over the problem of air charters in general. But this concern does not, as the plaintiffs contend, show that all charter flights are beyond the scope of the Convention. As Garnault of France said, "The necessity for the new Convention was determined by a lack of precision in the Warsaw Convention, and because of a need for finding out who was, actually, the person protected by the Convention". The Sub-committee stated, the difficult problems arise "when an aircraft, or any part of the space in an aircraft is chartered or hired with a crew". The question is not, Does the Convention apply. The question is, as the Committee reported, What are *"the respective liabilities of the owner and charterer or hirer under the Convention in respect of passengers"?* And the next question is *"whether*

in those provisions of the Convention which refer to 'the carrier', the owner of the charterer or hirer is the person meant". The Chairman of the Legal Committee took the same approach as the Brazilian Delegation thirty years before:

> "Rather than adopt a new convention . . . would it not be possible to achieve the same result by making an authentive interpretation of the word carrier *within the* meaning of the Warsaw Convention."

The discussion prompted Otto Riese, a German veteran of Warsaw and Citeja, to say that he did not believe that the Committee could draw a satisfactory definition of such a complex concept as charter. Richardson of Australia referred to the "basically different legal concepts in various countries". He thought, "To interpret this international convention on private air law was a matter for the courts and not for the Committee". The Committee took no action except to agree to continue its study of charters generally.

There the matter stood in 1957. There it stood in 1929. So it stands now.

We conclude that the history of the Convention, before and after Warsaw, shows that the Warsaw Convention applies to a voyage charter flight. The question courts must decide, within the context of each case, is: Who is the carrier?

V.

Commentators on air charters, generally speaking, recognize that the Warsaw Convention applies to certain charter flights.

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Professor Abrosini, a member of Citeja and one of the leading Italian delegates to the Warsaw Conference, was the author of a draft convention on the liability of an "owner" and "operator" of aircraft for damage to third persons. He carefully avoided using the term "carrier" ("transporteur"). It was this draft that led the Brazilian delegation to propose that "carrier" be defined. Ambrosini points out that standard voyage charter agreements have usually been given the character of contracts of carriage and, as such, are covered by the Convention.[57] He has commented:

> "The question, [the applicability of Warsaw to charters] to our way of thinking, was poorly stated since the problem is not whether the Convention is applicable to 'charter' proper and especially to 'time charter'. In such a case the answer is certain: the Convention *does not* apply. [Italics added]
>
> On the contrary what can be said is that if a contract called by the parties 'charter' is not in essence more than simple transportation then *it does* fall under the rules of the Warsaw Convention; just as transportation in which the charterer has contracted with a third-party and executes with the aircraft that he has chartered falls within that Convention but this is another matter."

Otto Riese, a German delegate to Warsaw, has written: "Our previously expressed opinion (Archf LR 1939 S. 137 ZAIP 1933 S. 979) that the Convention does not apply to charter contracts and that it is easy to decide if a transportation contract exists, we can no longer uphold.

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[57] Ambrosini, Fletamento y. Transporte-Com relacion al llamado "charter aereo," 1952 Revista Brasileira de Direito Aeronautico, p. 5.

We agree now with Goedhuis that there exists a loophole here." Riese, Luftrecht §42(3), at 408, (Suttgart 1949).

In 1954, Huibert Drion, Professor at the University of Leiden, Netherlands, wrote: "A voyage charter, however, by which one person assumes the obligation to carry with his aircraft and crew, from one point to another, certain persons or goods agreed upon or to be indicated by the charterer, would be a contract of carriage governed by the Convention. . . ." Limitations of Liabilities in International Air Law §53, at 57 (1954). In 1963, by affidavit filed in this case, Drion confirmed his earlier conclusion: "The fact that the carriage is performed pursuant to a charter contract between airline and an association does not set the transportation outside the sphere of application of the Convention, nor does it deprive the airline from its quality of 'carrier' within the meaning of the Convention, the liability of whom is governed by the provisions of the Convention. The Convention does not contain any provision excepting transportation performed under a charter agreement." Defendant's Exhibit "R".

Professor Daniel Goedhuis concluded that the owner of an airplane should be considered the carrier with respect to the charterer, because he finds himself to perform the transportation for the account of the charterer; the charterer would be the carrier with respect to the passengers. The Warsaw Convention would then apply to the charterer-passenger relationship, but not to the owner-charterer relationship. Goedhuis, Les Contrats de charte et de louage des aéronefs en connexion avec la Convention de Varsovie, 59 RDILC 687-702; National Air legislation and the Warsaw Convention 131-36 (The Hague 1937). Goedhuis, however, had reference to the situation where the charterer subcontracts the aircraft or where the charterer issues tickets and other necessary

traffic documents.[58] There is no inconsistency, therefore, between the position as stated in his writings and his affidavit which is filed in this case. In the affidavit Goedhuis emphasized the control of the plane by the owner-operator (Air France) and the issuance of tickets by the owner-operator,[59] which evidence the direct relationship between carrier and passenger contemplated in the Convention and required in connection with the issuance of Warsaw documents.

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[58] See discussion of Goedhuis in Grönfors, Air Charter and the Warsaw Convention 40-45 (The Hague 1956). The carrier ("transporteur") must be able to issue the necessary transportation documents. "The Warsaw Rules, Goedhuis states, apply to a wider extent to *voyage charter agreements* (where the owner puts at the disposal of the charterer an airplane equipped to make a specified journey which is international within the meaning of the Convention). *If the charterer is a private individual* who himself wishes to make the journey or who wishes to carry his own merchandise, the owner should be regarded as a carrier within the meaning of the Warsaw Convention, 'because the carriage is international and for reward, and because the charterer can be considered as a passenger' (or consignor). This carriage therefore comes under the Convention. *If the charterer concludes contracts of carriage with passengers or consignors,* the charterer in this situation will also be deemed to be a carrier within the meaning of the Convention, which thus applies. The owner, however, cannot in his relation to the charterer be looked upon as a carrier, as he is unable to satisfy the obligations of a carrier to issue the required transportation documents (no direct relation between him and the passengers or consignors). ¶The general idea behind the three leading principles of Goedhuis seems to be that *the Warsaw Rules cannot apply if, because of their construction, they* do not fit properly into the charter situation in question (i.e., the situation does not lend itself to the Rules)." Grönfors, p. 44.

[59] "His opinion has been asked on the question whether, in a situation in which 'A' charters an aircraft from 'C' [Air France] for the carriage of 'B' on a specific flight from the country of one High Contracting Party to the Warsaw Convention to the country of another High Contracting Party to this Convention, with return to the country of the first High Contracting Party, where 'C' [Air France], owns, operates and controls the aircraft and prior to departure delivers a ticket to 'B' for that passage, the Warsaw Convention would be applicable. ¶He states that provided the ticket delivered by 'C' meets the requirements of Art. 3 of the Convention, this question should be answered in the affirmative. ¶Both the history and the text of the Convention prove that when 'C' [Air France] is performing a carriage which constitutes international carriage as defined in art. 1(2) of the Convention and is satisfying the obligations imposed by the Convention, he has to be considered as carrier within the meaning of this convention." (Defendant's Exhibit "S".)

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Coquoz, author of De Droit Privé International Aerien (Paris 1938), distinguished between the leasing of an aircraft (a bare hull charter), which would not be governed by Warsaw, and "a manned aircraft" for "a given voyage" (voyage charter) or for "a given period of time" (time charter). "If the chartered aircraft serves for the transportation of the person [essentially the Air France-Atlanta charter flight] or of the goods of the charterer himself, we are confronted with an air transportation to which the Warsaw Convention undoubtedly applies."[60] At this point Coquoz discussed the question of the charterer subcontracting the aircraft, selling tickets for a profit to third parties, which is permitted in Europe but not in the United States. It was on this question that he disagreed with Goedhuis.[61] Sundberg points out too

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[60] Coquoz, *supra*, note 17, at 93.

[61] "This view [of Goedhuis] seems perfectly sustainable. It logically envisions the carriage in terms of a contractual obligation. The charterer who has engaged himself with regard to the passenger or the shipper is the only one held liable. ¶Nevertheless, we do not share this view [of Goedhuis]. The text of the Warsaw Convention seems contrary to such a restricting interpretation. According to its text (art. 1 and articles 17 to 20), the carrier is not necessarily the person that has participated in the contract, but rather the person that executes the carriage. ¶The solution—it is true—does not result in an obvious way. On the other hand, the acts of the CITEJA and of the conference reveal to us clearly enough, that the authors of the Convention did not intend to regulate chartering. This does not stop the Convention from being applicable, if the text permits it (25). Moreover, the legal tie that binds the owner and the charterer includes among other elements, a real carriage contract for the execution of which the owner exercises his usual activity of forwarding agent. It does not matter that the obligation of carriage concerns the charterer himself or the passengers and the shippers. It does not matter if the charterer is directly interested in the carriage or is acting as a commercial intermediary. In fact, an international carriage is executed by the owner: he is liable with regard to persons or goods transported, to fulfill all the obligations imposed upon him by the Warsaw Convention and his liability is under international law (26). The definition formulated by the delegation of Brazil at the Warsaw Conference, and mentioned above, confirms our point of view. It insists upon the action of carriage without taking into account the contract. On the other hand, the Convention does not determine the reciprocal relation of the owner and charterer in case of subchartering: it will therefore be necessary, in this respect, to consult common law, such as maritime law. ¶This legal situation is confusing and complex. It would be timely to introduce into the Warsaw Convention a provision which would eliminate all uncertainty." Coquoz, *supra*, note 17, at p. 93.

that Goedhuis is a typical proponent for the general continental school that finds contract as the basis for the Warsaw Convention's system, while Coquoz prefers to find the basis in the actual flights to be performed. Sundberg 299. Sundberg also notes that the majority view that the issuance of traffic documents requires a direct contract between the Warsaw carrier and the passenger/shipper; without this direct relation, there cannot be a Warsaw carrier and a contract of carriage in the sense of the Warsaw Convention. But, Sundberg observes:

> "To Coquoz and others of his persuasion this argument is no real objection. His own bases in this regard are most helpful. The direct relation exists naturally between the airline operating the aircraft and the passengers inside it and the shippers of the cargo put in it. To Coquoz, ticketing and waybilling are reduced to purely formal acts in the setting of the Convention; but to the general Continental school they are fundamental acts, prima facie evidence of the contract which puts the whole of the Conventional system into effect." Sundberg 305.

For K. Grönfors, as for other commentators, there is no doubt that charter flights come within Warsaw; the problem is how to determine who is the carrier. When the functions of a Warsaw carrier are divided, the party exercising the most important functions as the status of carrier.[62] "If the aircraft owner would in any

[62] See discussion of Grönfors in Sundberg, Air Charter, 306-7. "The complete Warsaw carrier, arrived at in this way is, of course, a rather utopian figure in air chartering. In general practice, when the Warsaw carrier functions are split between several persons, this approach would boil down to an attempt to fill this frame in the best possible way. This situation conceivably, offers at least three possible solutions. All people exercising Warsaw carrier functions may be Warsaw carriers because of such exercise. The one

case really have no practical possibility of issuing transportation documents, the Convention can no longer apply." Grönfors, Air Charter and the Warsaw Convention 91 (Stockholm 1956).

In short, almost all writers on the subject of the Warsaw Convention recognize that there are Warsaw charters and non-Warsaw charters. Most of the writers acknowledge that a three-party charter is a Warsaw charter; with them as with Citeja, the problem is, who is the carrier under the terms of the Convention.

V.

No reported decision is precisely in point. We agree with the district court's conclusion, however, that although "the question seems to be novel, other courts, where the issue could have been presented, have indicated that, in a similar factual situation, Warsaw would apply." 229 F. Supp. at 806.

The district court relied on *Flying Tiger Line, Inc. v. United States*, Ct. Cl. 1959, 170 F. Supp. 422, and *Mertens v. Flying Tiger Line, Inc.*, S.D.N.Y. 1963, 35 F.R.D. 196. Both cases deal with charter flights but in neither case did the plaintiff contend that charter flights were excluded from the scope of the Warsaw Convention. The courts did not examine the language or the history of the convention to determine if the Convention governed charter arrangement.

(Footnote continued)

who exercises most of these functions may be the Warsaw carrier. Or, the one who exercises the most important of these functions may have that status.—Here Grönfors reduces the impetus of his attack on other doctrines by taking the last solution, *and considers in his interpretation that the possibility to issue transportation documents is the most important function in view of the severe penalties attached to non-compliance.*" Sundberg 300.

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In *Flying Tiger Line v. United States,* the question was whether the two-year limitation contained in the Warsaw Convention barred recovery. The Court said: "There is no serious question as to the applicability, in general, of the Warsaw Convention to the transportation involved in this case."

In *Mertens,* the Court, in effect, held that the owner who was also the operator was the carrier. The United States chartered a plane from the airline to transport military personnel to Tokyo. One of the questions on a motion for a new trial was whether a charter flight came within a United States reservation to the Treaty excluding "transportation by air performed *by* the United States".[63] The district court dismissed the motion holding that "The fatal flight . . . was an international flight pursuant to the terms of the Warsaw Convention". But by prior agreement, as the Court observed, the parties had stipulated that the Warsaw Convention was applicable.

When *Mertens* reached the Second Circuit, 341 F.2d 851, the court noted that there were "doubts as to the applicability of the Convention" because of the reservation. It was "urged that because defendant's plane was regularly and in this instance chartered by the United States for the transportation of military cargo and personnel to military destinations this international transportation was 'performed by the United States', thereby making the Convention inapplicable". The Court held: "We are of the opinion, however, that the transportation was *performed by the Flying Tiger Line,* the owner and operator of the aircraft, and that it was performed

[63] Article 2 of the Convention declares: "This convention shall apply to transportation performed by the state or by legal entities constituted under public law . . ." United States adhered to the treaty with the sole reservation that Article 2 should not apply "to international transportation that may be performed by the United States". 49 Stat. 3013; 78 Cong. Rec. 11582 (1934).

for the United States *not by* the United States." The Court's doubts were dispelled by its study of the negotiations incident to the adoption of the Hague Protocol of 1955.[64] Thus, in *Mertens* the Court held that the Warsaw Convention covered a charter flight, even though the passengers were military personnel having no direct contractual relationship with the airline and even though there was a factual as well as contractual basis for concluding that the United States (the charterer) was the carrier. We note also that if, as the plaintiffs here contend, all charter flights are beyond the scope of the Warsaw Convention, there would have been no reason to propose that the Hague Protocol exclude military charter flights.

The Second Circuit cited with approval *Warren v. The Flying Tiger Line, Inc.*, S.D.Cal. 1964, 234 F. Supp. 223, rev'd on other grounds 1965, 352 F.2d 494. That case also involved a military charter. The aircraft was owned, operated, and controlled by the airline, although the United States, through the Military Air Transportation Service (MATS), determined the destination, the official stopping points, the time of departure, and the destination

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[64] "A draft protocol was prepared by the Legal Committee of the International Civil Aviation Organization at Rio de Janeiro in September 1953 and was submitted to the Hague Conference in September 1955. It sought to amend Article 2 of the Convention to read: 'The Convention shall not apply to . . . [c]arriage of persons, cargo and baggage for military authorities by aircraft the whole capacity of which has been reserved by such authorities.' The natural inference from this effort to amend the Convention is that without such an amendment the Convention would be applicable to such flights, or at least those proposing the amendment thought so. The proposed amendment was rejected by the Conference, though not because the representatives thought this exclusion was already provided for in Article 2. Instead, *the representatives thought it more appropriate to let each individual Contracting Party, if it so chose, to make the Convention inapplicable to flights chartered by the military.* Accordingly, a nation adhering to the Protocol was granted the legal power to declare that the Convention shall not apply to *military charter flights* on aircraft registered in that country, Article XXVI, Hague Protocol (Protocol Amending Convention for the Unification of Certain Rules to International Carriage by Air, The Hague, September 28, 1955), S. Doc. No. Executive H. 86th Cong., 1st Sess." 341 F. 2d at 854.

of passengers. The Court considered the history of the Hague Protocol of 1955 and its antecedents and concluded that "the reservation did not apply to military chartered flights . . . performed directly by the State". The plaintiffs contended that Convention was not applicable since the passengers were military men who were not free to contract for the travel in question. As to this, the Court, relying on *Ross v. Pan American Airways*, 1949, 299 N.Y. 88, 85 N.E.2d 880, held:

> "As pointed out in *Ross*, the aims of the Convention would be poorly served if it were held that the limitation of liability is available only where the carrier proved a consensual agreement. It seems evident that *the Convention anticipated the application of the limitation of liability where the carrier complied with article 3, which, among other things, required that a ticket be delivered to the passenger with a statement on it that the transportation was subject to the rules relating to liability established by the Warsaw Convention.*"

Ross did not involve a charter flight. In that case the flight was an ordinary flight, but the passenger's ticket had been purchased for the plaintiff, Miss Jane Froman, by a USO agent. The plaintiff said that she had never seen it. The court held that there was no need for the carrier to show more than the delivery of the ticket and the travel of the passenger in accordance with the ticket. The "Convention has automatic full impact, by its own terms and not because the parties have so agreed". 85 N.E.2d at 885. The Court did not hold that there was no contract; the court found that there was such a relationship through one Abraham as agent or through Miss Froman's ratification of Abraham's actions.

Appendix C

Two decisions in the French courts hold that the Warsaw Convention applied to the charter flight that were the subject of the litigation. *Air-Algérie v. Fuller Fréres, Cour de Cassation* (Ch. civile Sect. Com.) (1956) (Defendant's Exhibit G-1); *Trésor Public v. Cie. Aigle Azur, Tribunal de al Grande Instance de la Seine* (1 Ch. 3 Sect.) (1960). (Defendant's Exhibit G-2). In the *Air Algérie* case shippers sued freight forwarders who had chartered aircraft and the forwarders impleaded the operators. In *Trésor Public v. Cie. Aigle* two passengers were killed in the crash of a chartered plane on a flight between Laos and Viet Nam. Heirs sued the airline which, as in this case, was both the owner and operator of the aircraft. The court held that the Convention applied and that the Warsaw prescriptive period for suits, Article 29, barred recovery.

We do not rest our holding on these cases, because in none was the court's attention called to the issues before this Court.

VI.

We base our holding on the facts this case presents, the text of the Warsaw Convention, and the extrinsic aids to which we turned in our quest for the true meaning of the Treaty. The Warsaw Convention is based on the existence of a contract of carriage between the air carrier and the passenger. When a passenger is transported a contract of carriage exists whether or not the transportation is undertaken pursuant to an air charter. It exists regardless of the contractual relationships between the owner and the charterer and between the charterer and the passenger. Here Air France was the carrier. Air France assumed full contractual responsibility for the transportation of the passengers. In recognition of that responsibility, Air France controlled the

aircraft and operated it through an Air France crew. A passenger's right to be carried came into being only on the issuance and delivery of an individual ticket by Air France showing on its face the airline's obligation to perform the contract of transportation under the provisions of the Warsaw Convention. We hold therefore that the Convention applied to the transaction of the passengers in accordance with the charter flight agreement between Air France and the Atlanta Art Association.

The judgment is AFFIRMED.

JONES, Circuit Judge, Dissenting:

Federal jurisdiction is based on diversity of citizenship. 28 U.S.C.A. § 1332. The case is therefore one for the application of the Erie-Tompkins principles.

As stated in the majority opinion, Air France asserts three defenses: (1) that the flight was governed by the Warsaw Convention limiting liability to $8,291.97 for each person killed, (2) that the flight charter agreement or the tickets issued to each passenger purporting to incorporate by reference to the Warsaw provision, restricted recovery to the amount limited by the Warsaw Convention, and (3) that the law of France, where the accident occurred was controlling and that by such law the Warsaw limitation was applicable.

It is my view that the courts of Georgia, including a Federal court in a diversity case, are free to reject a limitation of liability of the law of the place where the fatal injury occurred and apply its own more liberal rule of unrestricted liability. *Pearson v. Northeast Air Lines,* 2nd Cir. 1962, 309 F.2d 553. The public policy of Georgia, enforced by its courts, renders invalid any contractual provision limiting the liability of a carrier of a

fare-paying passenger for personal injuries. *Southern Railway Co. v. Watson,* 110 Ga. 681, 36 S.E. 209; *Central of Georgia Railway Co. v. Lippman,* 110 Ga. 665, 36 S.E. 202, 50 L.R.A. 673. These principles would permit and probably would require a Georgia court to allow the plaintiffs in this litigation to recover such damages as they might prove, in the event liability is established, unless precluded from so doing by the Warsaw Convention.

Near the beginning of the majority opinion it is declared that "The Warsaw Convention applies to the international transportation of passengers under a contract of carriage on a 'voyage' charter flight." If I thought this was a correct statement of principles, I would agree that the judgment of the district court should be affirmed. Holding the view that the statement is not a correct statement of the controlling rule of law, I dissent.

The Warsaw Convention does not expressly include charter flights within the limitation of liability provision, nor are such flights expressly excluded from its operation. A treaty is to be construed in the light of the conditions and circumstances existing at the time of the treaty. *Pigeon River Improvements, Slide & Boom Co. v. Charles W. Cox, Ltd.,* 291 U.S. 138, 54 S.Ct. 361, 78 L.Ed. 695; *In re Zalewski's Estate,* 292 N.Y. 332, 55 N.E.2d 184, 157 A.L.R. 87; *Universal Adjustment Corporation v. Midland Bank,* 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407. The date of the Warsaw Convention was 1929. The Lindberg flight was two years earlier. The establishment of transatlantic passenger service was in 1939, ten years after the treaty. The circumstances existing in aviation were such in 1939 as to make it improbable that charter flights were within the contemplation of those who made the treaty.

Appendix C

If alternative meanings can be placed upon a treaty, the one adopted should, if possible, be that which is least restrictive of the rights of individuals. *Universal Adjustment Corporation v. Midland Bank, supra.* The rule that invalidates contract provisions which restrict the rights of passengers to recover for personal injuries is one generally prevailing in the United States. 13 C.J.S. 1182, Carriers § 629. The rule is founded upon public policy. *Aetna Casualty & Surety Co. v. Prather,* 59 Ga. App. 797, 2 S.E.2d 115; *Philippine Air Lines, Inc. v. Texas Engineering & Manufacturing Co., Inc.,* 5th Cir. 1950, 181 F.2d 923. Where the meaning of a treaty depends upon construction, as I think is the case here, the meaning adopted should be that which is consistent with a generally prevailing rule of public policy rather than one which should override it.

The scholarly magnum opus of the majority is most persuasive but I remain unconvinced. Therefore I dissent.

APPENDIX D.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21609

D. C. Docket No. 8286, Et Al—Civil Actions

BATES BLOCK, et al.,

Appellants,

versus

COMPAGNIE NATIONALE AIR FRANCE,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before JONES and WISDOM, Circuit Judges, and BREWSTER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

Appendix D

It is further ordered and adjudged that the appellants, Bates Block, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

November 8, 1967

JONES, Circuit Judge, dissents.
Issued as Mandate:

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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1089

BATES BLOCK ET AL., *Petitioners,*

vs.

COMPAGNIE NATIONALE AIR FRANCE, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 8, 1968

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 386 F.2d 323. The opinion of the United States District Court for the Northern District of Georgia is reported at 229 F. Supp. 801.

JURISDICTION

The Petition for Certiorari (p. 2) adequately sets forth the jurisdictional requisites.

QUESTION PRESENTED

"The [United States District] court [for the Northern District of Georgia] correctly limited the issue:

> 'there are various possible arrangements by which a charter flight might be made, and the question therefore is not "Does the Warsaw Convention apply generally to charter flights," but the question is, "Does the Warsaw Convention apply to this particular charter flight?" ' "

Block v. Compagnie Nationale Air France, 386 F.2d 323, 326 (5th Cir. 1967) (Appendix C to Petition, p. 61a, hereinafter referred to as "App. C").

TREATY INVOLVED

The Warsaw Convention, which is involved herein, is set forth in Appendix A to the Petition for Certiorari.

STATEMENT

These suits result from an accident involving an Air France Boeing 707 aircraft at Orly Airport, Paris, France, June 3, 1962. Petitioners (plaintiffs and appellants in the Courts below; hereinafter sometimes referred to as "plaintiffs") brought suit in respect to 62 of the passengers[1] against respondent (defendant and appellee below; hereinafter sometimes referred to as "defendant"). In addition to denying that the accident was due to its negligence, respondent set forth three defenses to the actions, asserting that the dispute as to its liability is controlled by: (1) the Warsaw Convention, which applies by its terms "to all inter-

[1] Claims respecting 60 of the 122 passengers were promptly settled in 1962, without litigation, at Warsaw Convention limits of $8,300.00 for each death, plus $829.00 for each loss of property.

national transportation" (Art. 1 (1)), (2) applicable French law, which incorporates the Warsaw Convention into the domestic law of France, and (3) the contracts of carriage, which expressly incorporated, by reference, the Warsaw Convention. The District Court upheld all of respondent's defenses against petitioner's motion to strike and motion for partial summary judgment, finding that, on its face, the Warsaw Convention applied to the relationship here involved between the carrier, Air France, and its passengers, petitioners' decedents.

Article 1 (1), (2) of the Warsaw Convention clearly states the scope and defines the coverage of the treaty:

> "Scope.
>
> "(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.
>
> "Definitions.
>
> "(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Trans-

> portation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention."

49 U.S. Stat. at L. at 3014, App. A to Petition for Certiorari, pp. 2a-3a.

Articles 17 and 18 of the treaty create in favor of passengers and shippers a presumption of liability on the part of the carrier in event of injury to the passenger or damage to goods transported.

Article 22 of the treaty provides, in pertinent part, that in the "transportation of passengers the liability of the *carrier* for each passenger shall be limited" [emphasis supplied] to approximately $8,300.00,[2] and the liability "of the carrier" for loss or damage to baggage is also limited. In either instance, a higher limit may be agreed upon between the "carrier and the passenger." (For Article 22 to apply, the passenger must have been furnished a ticket and baggage check in prescribed form (Articles 3 and 4).) In the words of the Court of Appeals, 386 F.2d at 328, App. C, p. 65a:

> "The district judge found Article 1 so clear that he concluded, '[T]he language contained in the Warsaw Convention is not ambiguous, and [the court] deems it unnecessary to resort to a discussion of the legislative history of the Treaty." [Brackets in original.]

[2] Under arrangements made in 1966, the current limit is $75,000.00. See 386 F.2d at 325 n.1, App. C, p. 59a. Where plaintiffs show injury resulted from the carrier's wilful misconduct, there is no limitation on recovery (Article 25).

Pursuant to 28 U.S.C. §1292 (b), petitioners were allowed an interlocutory appeal to the United States Court of Appeals for the Fifth Circuit on the issue of Warsaw Convention coverage. That court affirmed the District Court.[3] It agreed with the Trial Court that "on its face, the Warsaw Convention seems to cover all international carriage by air, without any limitation whatsoever." 386 F.2d at 327, App. C, p. 64a. In an exhaustive opinion, described by one panelist as a "most persuasive" and "scholarly magnum opus," the Court also considered in meticulous detail (29 reported pages, 69 mimeographed) the history of the Warsaw Convention (including every argument advanced by plaintiffs here, in the Court of Appeals, and in the District Court) and concluded that

> "The Warsaw Convention applies to the international transportation of passengers under a contract of carriage on a 'voyage' charter flight."

386 F.2d at 326, App. C, p. 61a. The Court stated, 386 F.2d at 353, App. C, pp. 115a-16a:

> "We base our holding on the facts this case presents, the text of the Warsaw Convention, and the extrinsic aids to which we turned in our quest for the true meaning of the Treaty. The Warsaw Convention is based on the existence of a contract of carriage between the air carrier and the passenger. When a passenger is transported a contract of carriage exists whether or not the transportation is undertaken pursuant to an air charter. It exists regardless of the contractual relationships between the owner and the charterer and between the charterer and the passenger. Here Air France

[3] The Court of Appeals ruled only on the applicability of the Warsaw Convention, stating, "we find it unnecessary to pass upon Air France's other defenses." 386 F.2d at 326, App. C, p. 61a.

> was the carrier. Air France assumed full contractual responsibility for the transportation of the passengers. In recognition of that responsibility, Air France controlled the aircraft and operated it through an Air France crew. A passenger's right to be carried came into being only on the issuance and delivery of an individual ticket by Air France showing on its face the airline's obligation to perform the contract of transportation under the provisions of the Warsaw Convention. We hold therefore that the Convention applied to the transaction of the passengers in accordance with the charter flight agreement between Air France and the Atlanta Art Association."

In other words, the Court of Appeals held that, upon the facts of this case, the Warsaw Convention applies (1) *ex facie,* and (2) as a matter of historical intent.

Petitioners did not ask rehearing in the Court of Appeals, but have sought certiorari from this Court.

It is desirable at the outset to see just what is undisputed on the one hand, and where the focus of controversy is centered on the other.

The transportation involved was "international transportation" as defined by Article 1 (2) of the Convention. Proper tickets and baggage checks were delivered to the passengers well in advance of commencement of the flight.[4] The carrier performing the transportation was respondent Air France. Those facts are undisputed. The Warsaw Convention was designed to apply to just such a situation: "international transportation" (Atlanta-Paris-Atlanta) was in-

[4] Plaintiffs "do not contend that the decedents failed to receive proper delivery of the tickets or proper notice of the Warsaw limitation of liability." 386 F.2d at 325 n. 2, App. C, pp. 59a-60a. See also 386 F.2d at 336, 353, App. C, pp. 80a, 115a-16a.

volved (Article 1), and proper documents ("tickets" and "baggage checks") were delivered to the passengers (Articles 3 and 4). The "carrier" (respondent Air France) is therefore entitled to the Convention limitation of liability (Article 22), and the passengers to the presumption of liability (Articles 17, 18).

The only controversy raised by petitioners centers around the fact that the trip was arranged as a "voyage" charter [5] to transport members of the Atlanta Art Association to and from Europe at the reduced rates available to "affinity groups" under Civil Aeronautics Board rules. Plaintiffs claim that the Warsaw Convention does not apply to flights denominated "charter," whatever the relationship of the parties under such "charter" arrangement. That argument is a red

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[5] As the Court of Appeals said, 386 F.2d at 329, App. C, pp. 67a-68a, "air charters may be divided into basic types.[17] (1) In a 'bare-hull', 'hire', or 'lease' charter the owner (airline) merely supplies a plane, without a crew, to a charterer, who may use it where and when he pleases; the charterer furnishes the crew and pays the expenses of operating the aircraft. (2) In a 'time charter' the airline provides the charterer with an equipped plane and crew for a specific period of time to use as the charterer wishes. (3) In a 'voyage charter' the owner charters his fully equipped plane and crew for a predetermined voyage. In a voyage charter, such as that entered into by Air France and the Atlanta Art Association, the owner controls and operates the aircraft. In effect, the middleman is eliminated, except for purposes of negotiating the charter. Although there are these three basic types of air charters, somewhat analogous to maritime charters, the degrees of control, discretion, and responsibility of the charterer can vary enormously from case to case, . . ."

"[17] The three categories of charter are widely recognized, Grönfors, Air Charter and the Warsaw Convention 15-16 (Martinus Nijhoff, The Hague 1956); Drion, Limitation of Liabilities in International Air Law (The Hague 1954); Sundberg."

herring: where there is a contract for international air transportation—a "marriage" between the carrier and the passenger, certified by a ticket delivered to each passenger (three weeks in advance of departure from Atlanta in the present case)—it matters not at all who played the role of marriage broker to bring the partners together. Whether it be a travel agent, or an affinity group, such as a local Garden Club or Art Association, or whether they entered the relationship directly without an agent, it is the relationship between the carrier and the passenger that makes applicable the Warsaw Convention:

> "The common denominator of all Warsaw contracts of carriage is the consent of the carrier to transport the passenger (or goods) and the consent of the passenger (or shipper) that the transport take place."

386 F.2d at 334, App. C, p. 76a.

The characterization of the trip as a "charter" trip is both functionally and conceptually irrelevant. The Court of Appeals recognized the true issue under the Warsaw Convention, 386 F.2d at 348, App. C, p. 105a:

> "The question courts must decide, within the context of each case, is: Who is the carrier?"

Plaintiffs have contended that, even though Warsaw is clear and unambiguous,[6] they are entitled to go to history and try to show that it *is* ambiguous and does not mean what it clearly says. Defendant does not fear

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[6] See statements by Mr. Kreindler at oral argument in the District Court, defendant's Exhibit L-1, pp. 4,8: "We don't argue it is ambiguous"; "We say to start with there is no ambiguity, . . . we say to start with we do not think the language of the Convention is ambiguous."

the history of the Warsaw Convention. On the contrary, as the Court of Appeals pointed out *in extenso*, the history of the Convention shows, and writers on the subject have universally asknowledged, that "carriers" performing voyage charters in international air transportation are covered by the Warsaw Convention. Petitioners' argument that the Warsaw Convention does not include charter flights (petition, p. 4) is misleading, confusing, and untenable.

SUMMARY OF ARGUMENT

There is no conflict of decisions. All other courts that have considered the issue here involved have decided it in complete harmony with the courts below. All legal scholars are in similar accord.

The case below was correctly limited to its own facts. It involves no broad legal principles of general public interest requiring certiorari.

ARGUMENT

The petition presents nothing warranting this Court's consideration. The issue is narrow: "does the Warsaw Convention apply to this particular charter flight?"

In fact, it may respectfully be asserted that there is no issue at all. Plaintiffs have contrived a peripheral issue out of the word "charter," whereas the perceptive analysis of the Court of Appeals demonstrates that the only real question is "who is the carrier?"[7] As Air

[7] In this connection, as we suggest below, pp. 15-16, the Court of Appeals may have under-appreciated the relevance of the discussion by the Second Circuit Court of Appeals in *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965) of that question—"who is the carrier?"

France unquestionably was the carrier,[8] the Warsaw Convention must apply to the factual situation before the Court.

This case arises out of the contract of carriage[9] — the undertaking by Air France to carry the passengers from Atlanta to Paris and return, and the consent of the passengers to be so transported, see 386 F.2d at 330-31, 332, 333-35, 336, App. C, pp. 69a-71a, 73a, 75a-79a, 80a. It presents no questions concerning a contract of hire, *i.e.*, a contract between an aircraft owner and someone "hiring" that aircraft, see *e.g.*, 386 F.2d at 329-30, 340-41, 341-48, App. C, pp. 67a-68a, 89a-91a, 92a-105a.

Warsaw covers the relationships created by the contract of carriage. The fact that there may be some unresolved questions arising out of contracts of hire in respect to *some* aspects of *some* charter relationships (not those before this Court) is of no consequence, for such questions are not presented by this case. Nevertheless, the "issue" as stated by plaintiffs—"Does the Warsaw Convention cover charter relationships?" — would include numerous such questions of no relevance here. For example, such a broadly stated "issue" attempts to raise the question whether the Convention governs the liability of the charterer (the Atlanta Art Association) to the

---

[8] Air France surely was "the carrier." The Atlanta Art Association was not the carrier, and it could not have been under Civil Aeronautics Board rules. Obviously, it was not the passengers and there was no one else involved. See, *e.g.*, discussion at note 36 of the Court of Appeals opinion; see also 386 F.2d at 330-31, 341, 349 (discussion of Goedhuis), App. C, pp. 70a-71a, 91a, 107a; see District Court Opinion, 229 F. Supp. at 806-07. Appendix B to Petition, pp. 43a-45a (hereinafter "App.B").

[9] The cause of action is based upon contract, not tort, theories. See 386 F.2d at 330-31, App. C, pp. 70a-71a.

plaintiffs. Obviously, that question is not involved here. "The judicial power does not extend to the determination of abstract questions." *Ashwander v. TVA,* 297 U.S. 288, 324 (1936).

This case was decided by the Courts below upon its own facts, not upon the fanciful "issues" tendered by plaintiffs.

The decisions of the courts below were correct.

Thus, without suggesting that this case is not important to the litigants, we do respectfully urge that it lacks public importance in the sense of this Court's Rule 19.

I. THERE IS NO CONFLICT OF DECISIONS.

Petitioners' statement (petition, p. 8) that this is a case of "first impression" is lacking in candor.

The District Court [10] and the Court of Appeals [11] discussed in detail both *Flying Tiger Line v. United States,* 170 F.Supp. 422 (Ct. Claims 1959) and *Mertens v. Flying Tiger Lines,* 35 F.R.D. 196 (S.D. N.Y. 1963), *aff'd,* 341 F.2d 851 (2d Cir.), *cert. denied,* 382 U.S. 816, *rehearing denied,* 382 U.S. 933 (1965), each of which applied the Warsaw Convention to voyage charter flights. The Court of Appeals, moreover, discussed other cases holding similarly, including *Warren v. Flying Tiger Line, Inc.,* 234 F.Supp. 223 (S.D. Calif. 1964), *rev'd on other grounds,* 352 F.2d 494 (9th Cir. 1965), and the French cases of *Air-Algérie v. Fuller Frères,* Cour de Cassation (Ch. Civile Sec. Com. 1956) (Defendant's Exhibit G-1) and *Trésor Public v. Cie. Aigle Azur,* Tribunal de Grande Instance de

[10] 229 F. Supp. at 806, App. B, pp. 42a-43a.

[11] 386 F.2d at 351-52, App. C, pp. 111a-115a.

la Seine (1 Ch. 3 Sect. 1960) (Defendant's Exhibit G-2). See 386 F.2d at 352-53, App. C, pp. 113a-15a. In addition, entirely harmonious decisions have been reported in *Demanes v. Flying Tiger Line, Inc.*, — F. Supp.—, 10 Avi. Cas. 17,611 (N.D. Calif., 1967), and in *Glassman v. Flying Tiger Line, Inc.*, 9 Avi. Cas. 18,295 (N.D. Calif., 1966), which were companion cases to *Warren, supra.*

Not one decision from any tribunal can be found stating or even suggesting that the carrier-passenger relationship involved in an international voyage charter flight is beyond the compass of the Warsaw Convention. Every Warsaw Conference participant who has considered the problem has concluded that the Convention applies to voyage charter flights such as the one involved here. The same conclusion has been reached by every recognized international aviation lawyer who has treated the subject.[12]

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[12] Indeed, Chief counsel for the petitioners has openly opposed the position he now espouses in this case. *E.g.*, "Any ticket showing that the place of departure and the place of destination are in countries adhering to the Warsaw Convention, would conclusively establish that the Convention applies to all passage indicated on that ticket." 1 KREINDLER, AVIATION ACCIDENT LAW §11.05[1], at 361-62 (1963). No exception to the general applicability of that statement was made by the author, who, prefacing his treatise in February 1963 (some eight months after the accident here involved, and after many of the lawsuits in this case had been filed), declared that his work was "designed to be a comprehensive presentation, and if a particular matter isn't in here, it is because it is too unimportant to mention." Kreindler, *op. cit. supra*, at vi. Mr. Kreindler re-emphasized that statement at page 175 of the transcript of the September 16, 1963 oral argument in the District Court:

> "Now, in my book I said the ticket is conclusive as to the applicability of the Warsaw Convention, *and it is.* The ticket is conclusive of the intent of the parties in *bringing themselves under the Warsaw Convention in having international travel.*" [Emphasis supplied.]

Plaintiffs addressed to the lower court some pronouncements recognizing that some aspects of some charter relationships might not be covered by the Warsaw Convention—the rights and liabilities arising out of the "contract of hire" (charterer-owner [Art Association-Air France], charterer-third party [Art Association-property owners injured on the ground near Orly] relationships, for instance)—because those matters are not of the essence of "international air transportation," which is the concern of Warsaw. However, with complete unanimity, the experts agree that a situation such as is presented here *is* covered by the Convention because the carrier-passenger relationship involves "international air transportation," the subject matter of Warsaw. The Court of Appeals stated:

> "The applicability of the Convention. . . . is based on a contract of carriage that arises from the relationship between a 'carrier' and the passengers.[20]

"[20] Lureau, La Responsabilité du Transporteur Aérien 84 (Paris 1961); Calkins, The Cause of Action Under the Warsaw Convention, 26 J. Air L. & Com. 217, 219-20 (1959); Riese and Lacour, Précis de Droit Aérien 233 (Paris 1951); Goedhuis, National Airlegislations and the Warsaw Convention 133 (The Hague 1937); Sullivan, The Codification of Air Carrier Liability by International Convention, 7 J. Air L. & Com. 1-2 (1936); Coquoz, supra note 16, at 68, 99."

386 F.2d at 330, App. C, p. 70a. Mr. Calkins, United States delegate to the Hague Conference, is quoted to the same effect by the Court, 386 F.2d at 347, App. C, pp. 103a-04a:

> "'Mr. Calkins (United States) said that there was no necessity for inserting additional provisions in the Convention for dealing with the various types of charter arrangements. The Warsaw Convention had been designed to deal with the *relation-*

> *ships between the parties to the contract of carriage* and, the Convention should not be extended beyond this. *** As to cases falling within the generally accepted definition of a charter, he believed that the Convention now adequately regulated the relationships between the parties to contracts of carriage and if there were charter contracts which did not fall within the definition of a contract of carriage, they should be left outside the Convention.' (Emphasis added.) SJX 14, ICAO Doc. 7686/LC/140, vol. 1, p. 234."

See also the Court's quotation of Mr. Calkins' views at note 21. DeVos, who had been Rapporteur of the Conference and who was identified by the Court of Appeals as "the primary author of the Convention," 386 F.2d at 342, App. C, p. 93a, had earlier put the matter succinctly, 386 F.2d at 343, App. C, pp. 95a-96a[18]:

> " 'Conclusion: Side by side with the rules established by the Warsaw Convention on the carrier's liability, there exists a matter connected with the contract of transportation concerning the relations between owners, charterers, lessees, et cetera, which can and should, to my mind, constitute the subject of a thorough examination on the part of the C.I.T.E.J.A.' (Emphasis added.) [51] " [Footnote 51 omitted.]

See also 386 F.2d at 330-36, 339-40, 341-43, 344, 345-48, App. C, pp. 70a-80a, 87a-89a, 92a-96a, 97a, 98a-105a. Plaintiffs are confusing two different concepts, and their insistence upon arguing from extraneous matters

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[18] The word "charterers" in the quotation is the word used by DeVos, and is correctly so reproduced in the official report. The word "charters" is incorrectly substituted in Appendix C to the petition. See note 28 below.

relating to a "hiring" contract that Warsaw does not "apply to charters" merely perpetuates the confusion[14] criticized by DeVos — the confusion between "two different contracts, the one between the carrier and the passenger and the other between the owner and the operator (charterer)," the first of which DeVos had no doubt was covered by Warsaw, and "the second [of which] should be examined, if at all, in a separate convention." 386 F.2d at 344, App. C, p. 97a.

The *Mertens* case, *supra,* is very much in point. There the United States government and the Flying Tiger Line had entered into a charter agreement by which Flying Tiger would transport military personnel on Flying Tiger aircraft from the United States to Japan. The plane crashed, killing all on board. Plaintiffs sued to recover for the wrongful death of their son, an Army officer, who was a passenger on the flight. The Second Circuit Court of Appeals held:

> "We are of the opinion however that the transportation was performed by the Flying Tiger

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[14] For instance, at page 16 n.13 of their petition, the plaintiffs quote Coquoz: "the Convention authors did not intend to regulate chartering," apparently to imply that Coquoz said that charter flights are not governed by Warsaw. The quoted statement does not support the inference petitioners would have their readers draw. The Convention authors *did* intend to regulate "international air transportation" and the Court of Appeals quoted Coquoz on the issue at hand:

> " 'If the chartered aircraft serves for the transportation of the person [essentially the Air France-Atlanta charter flight] or of the goods of the charterer himself, we are confronted with an air transportation to which the Warsaw Convention undoubtedly applies.' "

323 F.2d at 349-50, App. C, p. 109a [Bracketed material by the Court.]

> Line, the owner and operator of the aircraft, and that it was performed *for* the United States, not *by* the United States. . . .
>
> "The unavoidable conclusion is that the Warsaw Convention, as it is presently binding on the United States, is applicable to the flight in this suit."

341 F.2d at 853, 854. [Emphasis in original.] The Second Circuit focused upon the right question, the identity of the carrier, Was it the government (the charterer), or the airline company owning and operating the aircraft? Upon finding that Flying Tiger was the carrier, it arrived at the "unavoidable conclusion" that the carrier-passenger relationship was governed by Warsaw. As noted above, the Court below cogently observed that the question "who is the carrier" is the crucial inquiry, 386 F.2d at 348, 351, App. C, pp. 105a, 111a. Under the holding in *Mertens,* Air France is the "carrier" in the present case and the carrier-passenger relationship here involved is covered by Warsaw.

There are no opinions contradictory of those below and there is no conflict of decisions for this Court to resolve.

2. NO CRITICAL QUESTIONS OF TREATY INTERPRETATION ARE POSED.

At the outset it is to be noted that the District Court held the Warsaw Convention applicable on its face. The Court of Appeals reached the same conclusion.

Nevertheless, plaintiffs insisted that regardless of the plain meaning of the treaty, inquiry should be made into its historical background and all surrounding contemporaneous and subsequent circumstances to determine its intent. In accordance with plaintiffs' wishes, the Court of Appeals conducted an exhaustive

inquiry into the history of the treaty, applying the tests urged upon it by the appellants. (Compare Brief of Appellants below at pp. 125-34 with 386 F.2d at 336-38, App. C at pp. 81a-83a.) Now, as petitioners, plaintiffs complain of the results of that inquiry, which led the Court to a conclusion different from that desired by petitioners.[15]

It is axiomatic that intent is the touchstone of legislative interpretation. There is no real dispute as to the intent of the Warsaw Convention conferees. The Court of Appeals held, 386 F.2d at 327, App. C, pp. 63a-64a:

> "The Conference achieved its two primary objectives: (1) uniform rules relating to air transportation documents (passenger ticket, baggage check, and air waybill); (2) limitation of the carrier's liability for an airplane accident. In accomplishing the second objective, the Conference recognized the need for a quid pro quo by establishing a

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[15] Defendant opposed, and opposes, plaintiff's standards of treaty interpretation. See respondent's December 22, 1964 brief in the Court of Appeals, pp. 48-52 and Appendix A thereto, pp. 1a-37a. In short, defendant's position is that no interpretation was proper, because the treaty is unambiguous, *e.g.*, *Ex Parte Collett*, 337 U.S. 55, 61 (1949), *United States v. Shreveport Grain and Elevator Co.*, 287 U.S. 77, 83 (1932). Secondly, even if legislative history were a proper source of inquiry, *only* that legislative history called to the attention of the President and the Senate may be considered, *Arizona v. California*, 292 U.S. 341, 359-60 (1934), and, then, even if so-called "legislative history" of which the President and Senate were aware may be resorted to, that history must come from competent sources, *e.g.*, *Fogarty v. United States*, 340 U.S. 8, 13-14 (1950); *United States v. United Mine Workers*, 330 U.S. 258, 281-82 (1947); *United States v. Allen*, 179 Fed. 13, 18-19 (8th Cir. 1910), *rev'd on other grounds*, 224 U.S. 448 (1912); *State Wholesale Grocers v. Great A & P Tea Co.*, 154 F. Supp. 471, 484-85 (N.D. Ill. 1957).

presumption of the carrier's liability, thereby shifting the burden of proof from the passenger to the carrier. (Article 20.) Secretary of State Cordell Hull, in transmitting the Warsaw Convention to the United States Senate in 1934, explained:

> 'It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges. * * * The principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability, seems to be reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportation.'[8] [Footnote 7 by the Court omitted.]

"[8] Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 (1934)."

Clearly the intent of the Conference was to limit the liability of air carriers engaged in international air transportation.[16] In return for that limitation of liability (which limitation can be modified upward by

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[16] See, *e.g.*, DeVos, SJX 6, p. 407; and 1 KREINDLER, AVIATION ACCIDENT LAW § 11.01[2], at 342: "Its [Warsaw's] most important provision was a limitation of liability. . . ."

agreement between the passenger and the carrier), the passenger received a presumption of liability, and a set of rules of uniform applicability throughout the world —if an American passenger is injured or loses his baggage while on international air travel in Ruritania, he is not subject to the vagaries of Ruritanian law, but to a uniform set of rules.[17]

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[17] An idea of the practical difficulties solved by the "Unification of Rules" appears in the District Court's opinion in *Warren v. Flying Tiger Line, supra,* 234 F. Supp. at 229-30:

> "The Warsaw Convention eliminates many conflict of law questions which would have otherwise confronted passengers, shippers, and airlines. The Convention also placed the burden of proof on the carrier by providing that the carrier is liable for damage unless it proves that it and its agents have taken all necessary measures to avoid damage. In the absence of the Convention, the law of the United States would require a claimant in varying degrees to explain the accident and prove that the loss or damage resulted from specific negligence or wilful act of the carrier. Under the Convention, the rights of passengers, shippers, and air carriers are the same in all of the countries parties to the Convention. Without the Convention, a single flight might involve the laws of many different countries, placing upon the passenger the burden of attempting to establish a claim under the most difficult, if not impossible, circumstance. As a matter of fact, in some countries without the Convention the claimant might well find himself without any remedy whatsoever.
>
> "As pointed out in *Ross,* the aims of the Convention would be poorly served if it were held that the limitation of liability is available only where the carrier proved a consensual agreement. It seems evident that the Convention anticipated the application of the limitation of liability where the carrier complied with article 3, which, among other things, required that a ticket be delivered to the passenger with a statement on it that the transportation was subject to the rules relating to liability established by the Warsaw Convention."

See also the recent expressions by the State Department, referred to at pp. 26-27 below.

The magnitude and practical complexities of those conflicting problems have been enormously expanded, of course, in today's jet

The "legislative" intent was to make the Convention applicable to "all" international transportation, save for three express exceptions (specifically characterized by the drafters as "narrow"), none of which is pertinent here. See 386 F.2d at 328-29, App. C, pp. 65a-67a. The Court of Appeals quite properly observed that if "the Warsaw framers intended to create an exception for charter flights it is difficult to see why they did not include a specific provision in the Convention" excepting such flights. 386 F.2d at 329, App. C, p. 67a. Plaintiffs admit (petition, p. 10) that the Convention "does not mention charter." That fact supports the decisions below. Having declared in Article 1 (1) of the Convention that the Convention applies to "all international transportation," the drafters had said all that needed to be said, or that usefully could be said. Perhaps redundantly they could have added: "including but not limited to individually-ticketed, individually-waybilled, charter, inclusive tour, package vacation and other transportation," but the drafters of Warsaw were not guilty of loose writing or loose thinking. They did what they set out to do, expressing themselves with an economy of language, saying what

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age where the sonic speeds and hemispheric trips which are common-place will be succeeded shortly by supersonic speeds and global voyages outracing the sun. It is a tribute to the vision of the Warsaw Conference that the Convention retains its vitality, and commands the respect of the world 40 years after its inception. Perhaps that is because the conferees recognized at the outset that *"what engineers are building for motors, we, jurists, must do for the code."* DeVos, cited by the Court of Appeals, 386 F.2d at 339, App. C, p. 86a [emphasis in original].

needed to be said, and, where necessary, limiting the application of the Convention by specific exceptions.[18]

In finding Warsaw applicable to the transportation here involved, the Courts below simply followed the clear intent of the drafters of the Convention.

Insofar as the Court of Appeals adverted to the importance of French legal concepts in determining the meaning of the treaty, the Court was simply considering one of the factors plaintiffs said the Court should consider to ascertain that intent.[19] It thus ill-becomes the plaintiffs now to complain (petition, pp. 5, 8-9, 15-16) that the Court did what they asked it to do. The Court appropriately recognized that if *all* factors were to be considered as plaintiffs urged, those factors certainly included the facts that a majority of the conferees were civilians, that the conference was conducted in French, that the minutes were reported in French, that the treaty was drafted in French, that the terms used are the terms of the civil law system and that the

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[18] Plaintiffs argue that the courts below in holding that "all international transportation" includes "charter" transportation, have inserted a *casus omissus* into the treaty, as the word "charter" does not appear in the treaty. (Petition, p. 10). The fact is that it is the *plaintiffs* who seek to supply a *casus omissus* to the *exceptions*, suggesting a *fourth* exception, namely: "4. This Convention shall not apply to charter flights." The courts have not added anything to the declared scope of the treaty; they have simply held that "all" means "all."

[19] Plaintiffs argued to the Court of Appeals (first 5th Circuit brief, p. 126) that:

> "'Among the factors to be taken into account by way of guidance in the interpretative process are the following:
>
> '(a) The ordinary meaning of the words of the agreement and *the context in which they are used.*'" [Emphasis in original.]

United States adhered to the French language treaty. Thus, the approach of the French legal system must be considered, especially because the hope in a multination treaty like Warsaw is to achieve a "harmonizing construction of the Convention," and such "harmonizing" is mandatory in view of "the necessity for maintaining uniformity" of application through all legal systems—common-law as well as civil law.[20] See 386 F.2d at 330, App. C, pp. 68a-69a. That is a far cry from adopting the "primacy of the French system" or abandoning traditional concepts of United States law, as plaintiffs have charged in their nationalistic smokescreen.

There was no "abandonment of our own standards of treaty interpretation in favor of a French law approach," as plaintiffs charge (petition, p. 15). The Court of Appeals discussed in detail the rules by which United States courts interpret treaties, 386 F.2d at 336-38, App. C, pp. 81a-83a. Though finding it important to consider the rules of the French legal system, the Court cautioned "[t]his principle should not be carried to extremes . . ." 386 F.2d at 330, App. C, p. 69a. As noted above, the Court looked at the very history to which the plaintiffs directed it. It considered each argument presented by the plaintiffs and found that history refutes plaintiffs' contention that Warsaw did not apply to this flight.

The jingoism of petitioners' approach also shines through in their suggestion (petition, pp. 11-16) that Americans do not have to play by the same rules as the rest of the world, despite the solemn pledging of the

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[20] It goes without saying that uniformity of application requires that the same rules govern all international air transportation, whether it be individually-ticketed or charter or whatever.

public honor to the international agreement of Warsaw adhered to by nearly one hundred nations. Respondent can concede a uniqueness in the American character, but respondent insists that Americans, perhaps pre-eminently, recognize their world-wide responsibilities. However much others may misunderstand, question, or oppose the judgments of the United States in international affairs, history does not support petitioner's contention that it is part of the American character and credo to welsh on international agreements.[21]

The Supremacy Clause of the Federal Constitution, Art. VI, Cl. 2, makes it clear that there is no "public policy" superior to treaties of the United States. The Georgia Constitution, Art. XII, Sec. I, Para. I, Ga. Code Ann. § 2-8001, similarly declares that: "The laws of general operation in this State are, first: As the Supreme Law: The Constitution of the United States, the laws of the United States in pursuance thereof and all treaties made under the authority of the United States." Georgia Courts recognize that a "treaty is the supreme law of the land." *Howell* v. *Fountain,* 3 Ga. 176, 179 (1847). (Since 1847, no liti-

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[21] See petitioners' astounding (and unsupported) statement (petition, p. 12) that "in private right treaties, the integrity and good faith of the national government are not involved. . . ."

There is no support for plaintiffs' claim (petition, p. 12) that a distinction may be drawn between "public" and "private" treaties. The Constitution declares "treaties" to be the Supreme Law of the land. The case of *Haver v. Yaker,* 76 U.S. (9 Wall.) 32 (1870) does not draw the distinction plaintiffs claim for it. Plaintiffs' quotation from that case (petition, p. 12 n.10), shows only that, as a matter of the law of nations, a treaty is binding upon the United States as of the moment the Executive signs it, although as a matter of domestic law, the treaty is binding only upon ratification.

gants in Georgia have, until now, challenged that principle, so far as respondent can determine from the reported cases.)

Considerations of "policy" are thus irrelevant. Moreover, plaintiffs' arguments as to the applicable "policy" are erroneous.

Petitioners' contention that the limitations on liability contained in the Warsaw Convention offend American public policy[22] (petition, p. 13) is plainly unfounded.

The Warsaw treaty, made by the President of the United States and concurred in by the Senate *is, ipso facto, the* public policy of the United States.

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[22] Internal United States policy is by no means susceptible of the generalized treatment given it by petitioners. Several American states have limitations on recovery for any wrongful death *without* any presumption of liability, while others have no such limitation. Maritime laws also recognize limitations upon liability. Further, respondent believes that every State has workmen's compensation laws in which a presumption of liability is exchanged for a limitation upon amount of recovery.

Warsaw of course is of the workmen's compensation *genre*—it trades a presumption of liability and a uniform set of rules for a limitation of liability. Petitioners have not identified *any* jurisdiction where that kind of exchange is contrary to public policy, and respondent has found none.

Pursuing the workmen's compensation concept a bit further, we presume that no one would argue that the workmen's compensation law did not apply in the case of an employee hired through an employment agency or through a union hiring hall, and applied only to those employees who negotiated directly with their employer for their jobs,—yet that is the pitch of plaintiffs' arguments here. In workmen's compensation law the test is whether there is an employer-employee relationship; in international air transportation the question is whether there is a carrier-passenger relationship. In either case an affirmative answer invokes the presumptions and the limitations.

Thus, the logical conclusion of Judge Jones' statement quoted at page 15 of the petition,

> "Where the meaning of a treaty depends upon construction, . . . the meaning adopted should be that which is consistent with a generally prevailing rule of public policy rather than one which should override it,"

is the conclusion actually reached by the Court of Appeals,—namely, that Warsaw applies to the international voyage charter trip here involved. The "prevailing rule of public policy" of the United States in "all international air transportation" is that stated by Warsaw. It is *petitioners* who seek to "override" the prevailing rule,[23] by claiming that "all international

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[23] A somewhat similar anomaly arises out of the first sentence quoted (petition, p. 14) from Judge Jones' opinion below, but his (and petitioners') error proceeds from a misreading of the *Midland Bank* case there referred to. The holding of that case is that:

> "When a treaty provision fairly admits of two constructions, one restricting, the other enlarging, *rights which may be claimed under it*, the more liberal interpretation is to be preferred." *Universal Adjustment Corp. v. Midland Bank*, 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407, 1422 (1933). [Emphasis supplied.]

The case simply does not support Judge Jones' statement (quoted at p. 14 of the petition) that the construction is preferred "which is least restrictive of the rights of *individuals*" ("individuals" presumably being natural persons, and excluding corporate personalities). There is a vast difference in content, both substantive and emotional, between what the case said and what the dissent said it said. In the present context the import is considerably altered, for it is respondent Air France that is claiming rights under the treaty, and is therefore entitled to the "liberal interpretation." In the very nature of things, a treaty is intended for the benefit of those claiming under it, and not for "individuals" generally. The quotation from *Midland Bank* is, of course, taken from this Court's identical pronouncements in *Jordan v. Tashiro*, 278 U.S. 123, 128 (1928); *Asakura v. Seattle*, 265 U.S. 332, 342

transportation" means "some international transportation."

The Department of State has only recently reaffirmed the importance of Warsaw to the national interests of the United States, describing the Convention as

> "one of the principal multilateral agreements applicable to international air transportation. It . . . creates a uniform body of law with regard to the rights and responsibilities of passengers, shippers, and air carriers in international transportation."

Department of State, United States Government Action Concerning the Warsaw Convention (May 5, 1966), reprinted in 32 J. Air L. & Com. 243 (1966). Additionally, in a hearing before the Senate Foreign Relations Committee concerning the Hague Protocol, Leonard Meeker, Legal Adviser—Designate of the Department of State, said:

> "On the whole, the Department of State believes the Warsaw Convention has been beneficial to air transport and air travelers. If we had no convention, many victims of air disasters would have

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(1924); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902); and cases cited in those precedents. Each of those cases also enunciates the rule that treaties are to be construed "liberally" to achieve the intentions of the parties to the treaty,—in the case of Warsaw, to limit the carriers' liability in return for an assured set of benefits. Respondent is unable to find, nor have petitioners cited, a Supreme Court or other case declaring the rule to be different for so-called "private rights" treaties. The statement by the British Columbia Supreme Court referred to at page 14 of the petition is dictum, for the Court ruled: "There is, however, no occasion to depart from the plain meaning of the words used in the [Warsaw] Statute." *Stratton v. Trans Canada Air Lines*, 7 Avi. Cas. 17,724, 17,725 (Br. Col. S. Ct. 1961).

> great difficulty in pursuing effective remedies and securing prompt recoveries in the case of accidents occurring over the high seas or in foreign countries with laws different from our own."

Hearings Before The Committee on Foreign Relations, Executive H., U. S. Senate, 86th Congress, 1st Sess., p. 2 (May 26, 1965). (And of course, Mr. Calkins of the United States had declared that Warsaw applies to charter flights, see pp. 13-14 above, thus enunciating that the United States' policy as to *charter* flights is *Warsaw*.)

Those declarations by the Executive Department of the United States government charged with administering the foreign relations of the country afford contemporaneous "political" support for the result reached by the Court of Appeals, giving effect, as it did, to the intention of the framers of the Convention, and to the reasonable expectations of the adherents to it. They also show that this is no time to tamper with the Treaty.

In light of petitioners' astonishing view of the (lack of) sanctity of treaties touching "private rights," the Court might understandably feel that perhaps it should clarify the status of such treaties. However, that is not necessary, for it clearly appears from this Court's recent decision in *Zschernig* v. *Miller*, — U.S. —, 88 S.Ct. 664 (1968) that treaties affecting "private rights" (and what treaty does not, directly or indirectly, do so?) are not, as claimed by petitioners, second- (or lower-) class treaties worthy of no respect beyond that dictated by the transitory self-interest of the day. In *Zschernig* v. *Miller, supra*, this Court upheld a 1923 treaty with Germany, reaching a result that must surely have been as unpalatable to this Court

as it was to the State court whose decision was reversed, in that under the treaty, the East German next of kin of an Oregon intestate (and presumably in practical effect, the East German Government) was allowed to inherit in contravention of Oregon's public policy, plainly expressed by positive statutory and decisional law. In the concurring opinion, it was pointed out that nearly 200 years of national honor (actually antedating the Confederation) was wrapped up in this Country's agreements with other nations of the world regarding the right of individuals to inherit property.

When the United States gives its word to the nations of the world, it honors its commitments. The decision of the Court of Appeals here is in complete harmony with that principle.

The lower Courts' decisions that Warsaw is applicable are completely consistent with this Court's decisions, with this Country's National honor, and call for no remedial action by this Court.

3. THERE IS NO ERROR IN THE RULING BY THE COURT OF APPEALS UPON THE "LEGISLATIVE HISTORY" TENDERED BY THE PLAINTIFFS.

The same "wealth of historical data" promised by plaintiffs to this Court (petition, p. 17) was presented to the Court below and carefully considered by it. Plaintiffs do not deny this—they simply say (*id.*) that the "court below was wrong in its conclusion" drawn therefrom. If the Court of Appeals erred, that Court should have been afforded the opportunity to correct its error by the timely filing of a motion for rehearing. This Court, of course, does not exercise its certiorari jurisdiction "merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Co.* v. *Coty,* 262 U.S. 159, 163 (1923). It is the office of

the motion for rehearing in the Court of Appeals to correct errors made by that Court. No such motion was filed, perhaps because plaintiffs realized the Court below had carefully considered all the arguments plaintiffs had addressed to that Court,[24] and now attempt to rehearse in this Court.

A. The Fact That Experts May Have Continued To Study Problems Related to the Hiring of Aircraft Does Not Show That Charters Are Not Within the Contemplation of Warsaw.

The Court below considered in detail every mention of charter and Warsaw made before, during and after the Conference, 386 F.2d at 326-27, 329-52, App. C, pp. 62a-115a. The experts have always agreed that Warsaw governs the carriers' liability to the passengers arising out of the contract of carriage; less clear, perhaps, are the relations (not at issue here) "between owners, charterers, lessees, et cetera," 386 F.2d at 343, App. C, p. 96a. It was to this (here irrelevant) *second* category of relations that the experts addressed their efforts subsequent to the 1929 Conference, the question of the liability of carriers to passengers having been resolved by the Warsaw Convention. The distinction

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[24] Fifth Circuit Court Rules 25(a) and 29 contemplate both rehearing and rehearing *en banc*. As plaintiffs seemingly take comfort in the fact that there was a dissent in the Court of Appeals (petition, pp. 5-6, 8, 14-15, 17, 31), it is particularly significant that no rehearing was sought. It should be observed that the existence of a dissent below is of less than usual value. Dissenting Judge Jones starts from the premise of opposition to limitations upon liability; then he finds that inasmuch as the Convention did not name charter flights, the treaty is susceptible to interpretation, and he therefore interprets it in accordance with his views. 386 F.2d at 353-54, App. C at 116a-18a. (We have, at p. 25 n. 23, above, shown certain errors in the dissent.) Nowhere does the dissent take issue with the historical exegesis of the majority; to the contrary, the dissent terms it a "magnum opus" that is "most persuasive." 386 F.2d at 354, App. C, p. 118a.

is clearly drawn, and plaintiffs are simply seeking to confuse the issue.

For plaintiffs to claim (petition, pp. 17-18) that the continued work on the unresolved aspects of the *hiring* (leasing) concept shows that charter was not there in 1929 is like claiming that if respondent continually inspects, maintains, repairs, overhauls and retrofits its aircraft to improve their performance, it must be assumed that the airplane does not exist.

B. The "Brazilian Proposal" was Thoroughly Considered by the Court of Appeals.

Plaintiffs now persist in a subtle transition, which they unsuccessfully attempted in the Court below,—one that changes considerably the meaning of the so-called "Brazilian proposal." At page 19 of their petition, plaintiffs claim that "[t]o cover *charters* . . . the Brazilians suggested a clause defining the word 'carrier' to include both owner and charterer in a charter situation," and (*id.* at 21) they claim that "Ambrosini, Coquoz and Drion, . . . all agreed that the purpose of the Brazilian proposal was to include charters within the Warsaw Convention." [25] [Emphasis supplied.]

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[25] We have shown at p. 15 n. 14, above, that Coquoz stated that a flight of the sort here involved is covered by Warsaw, a point also made by the Court below, 386 F.2d at 349-50, App. C, p. 109a-10a. Similarly, both Drion and Ambrosini declared that a voyage charter trip of the sort here involved is within the scope of Warsaw. 386 F.2d at 348 (Ambrosini: "if a contract called by the parties 'charter' is not in essence more than simple transportation then *it does* fall under the rules of the Warsaw Convention; . . ." [emphasis in original]), 348-49 (Drion: "A voyage charter, however, by which one person assumes the obligation to carry with his aircraft and crew, from one point to another, certain persons or goods agreed upon or to be indicated by the charterer, would be a contract of carriage governed by the Convention. . . ."), App. C, pp. 106a, 107a. See also Defendant's Exhibit R.

The plaintiffs subtly have substituted "charters" for "charterers," a deception that did not confuse the Court below, which found that the "Brazilian proposal" to define "carrier"[26] simply "recognizes . . . that in some circumstances a problem will exist as to *who is the carrier for Warsaw purposes.*" 386 F.2d at 341, App. C, p. 90a [emphasis in original]. The Court accordingly did "not agree" with plaintiffs' claim that rejection of the Brazilian proposal served to reject any connection between the Convention and Charter flights. *Id.*

But what if the so-called "Brazilian proposal" had been adopted? The word "carrier", wherever it appears in the Convention, would then be defined as "owner, charterer or pilot." What effect would that have had? For one thing, under the terms of the Convention, charterers (and pilots) would be subject to the presumption of liability of Article 17 ("The car-

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[26] According to the Court of Appeals, the "Brazilian Proposal" would have defined "carrier" in the following terms:

> "The carrier shall be considered the person who owns, charters or manages an aircraft, uses it individually or jointly in the transportation of persons and goods, within the meaning of this convention, and in conformity with national regulation." [Court's footnote 43 omitted.]

386 F.2d at 340, App. C, p. 89a. The original proposal, sent to the preparatory commission, and reported out as quoted above, actually referred to the "owner, *lessee,* or pilot" (SJX6, p. 470). Giannini, Chairman of that commission, misread the original "Propriétaire, *locataire,* ou conducteur" (SJX6, French version, p. 187) as "propriétaire, *affréteur,* ou conducteur" (SJX6, French version, p. 97)—"owner, *charterer* or pilot" (SJX4). Thus the "Brazilian proposal" referred to by plaintiffs is actually Giannini's mis-statement of that proposal. The Convention delegates had before them the text of the Brazilian proposal in its correct form as Giannini made his report. The delegates were therefore aware of the true nature of the proposal (SJX6, p. 16).

rier [charterer, pilot] shall be liable . . . .''), and the limitation of liability of Article 22 (''. . . the liability of the carrier [charterer, pilot] shall be limited . . . .'').

But the Giannini statement of the Brazilian proposal was not adopted. What effect does that have? The charterer (here, the Atlanta Art Association) is not a ''carrier'' within the meaning of the Warsaw Convention. But, does the non-passage of the Giannini-Brazilian proposal remove from the *carrier* (Air France) the applicability of the Convention? Certainly not. The fact that Warsaw may not apply to charterers (and ''manufacturers, maintenance companies, airport operators, dispatching companies, air traffic controllers, etc.''),[27] does not affect Air France one iota. Warsaw applies to the ''carrier''; Air France was the carrier; ergo, Warsaw applies to Air France.

It is thus of no consequence that the ''Brazilian proposal'' was not adopted. It is of some significance, however, that Article 1 (1) of the Convention was amended *after* rejection of the ''Brazilian Proposal'' by adding the word ''all'' in front of ''international transportation,'' thus emphasizing that Warsaw covers ''all international transportation,'' including any transportation forms that may have been suggested during consideration of the ''Brazilian proposal.'' 386 F.2d at 338, App. C, p. 84a.

C. The IATA Questionnaire and the Answers Thereto Support the Applicability of Warsaw to the Present Case.

Although plaintiffs emphasize (petition, pp. 24-26) the fact that Major Beaumont (and IATA) asked questions about charter in 1932, they are highly selective in their presentation of Major Beaumont's answers.

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[27] 1 KREINDLER, AVIATION ACCIDENT LAW § 11.05[7], at 368.

(A lawyer may very well know the answer when he asks the question; indeed, it is almost an inviolable rule of advocacy that he not ask the question if he doesn't know the answer.) The answers—all congruent with the result reached by the Court below—are examined in depth by the Court of Appeals, 386 F.2d at 342-44, App. C, pp. 94a-98a. They flatly contradict petitioners' assertion (petition, p. 26) that "the airlines . . . and . . . Beaumont . . . knew that the Warsaw Convention had not taken charters into consideration."

Plaintiffs fail to mention DeVos's response to the IATA Questionnaire:

> "*Whether the party who accepts the transportation is the owner or simply the charterer—for a period of time or by the trip—the situation of the passenger (transporté) or the shipper will not be changed: their rights and their obligations continue to be determined by the articles of the Warsaw Convention.*"

386 F.2d at 343, App. C, p. 95a [emphasis by the Court]. The Court of Appeals pointed out that Beaumont "saw eye to eye with DeVos" on the "question before this Court," 386 F.2d at 343, App. C, p. 96a. As noted by the Court of Appeals, *id.* at n. 51, DeVos's answer was translated into English and circulated to the Department of State and the Secretary of Commerce *before* the United States adhered to the Convention. Thus, when the United States adhered to the Warsaw Convention in 1934, it knew of DeVos's views.

Plaintiffs imply (petition, p. 26, n. 39) that IATA Decision #8 (1933) casts doubt upon the authenticity of the holdings below in that "Decision #8" proposed "an international convention treating exclusively with"

"*special* charter contracts." But "Decision #8" grew out of Major Beaumont's Report to IATA, "The Convention of Warsaw and Special Charter Flights" (Defendant's Exhibit U-2) where Major Beaumont considered some practical problems of fulfilling the Convention's documentation requirements in some charter situations. However, those problems arose *because* Warsaw *was* applicable. Beaumont declared:

> "In so far as contracts of Special Charter constitute contracts for international carriage by air the provisions of the Warsaw Convention apply to such contracts." Defendant's Exhibit U-2, p. 1.

In addition, Beaumont noted that under the domestic laws of some nations, some carriers in some charter situations might be regarded as both "carrier" and "charterer," an "almost impossible" predicament, in his view. He felt that attempts by individual nations to clear up through changes in their domestic laws the uncertainties he saw would simply multiply the problems and, accordingly, he recommended a subsequent revision of the Convention to achieve uniformity. That was the import of "Decision # 8." See Defendant's Exhibit U-2; see also 386 F.2d at 343, App. C, p. 96a. As the Court of Appeals noted, 386 F.2d at 344, App. C, p. 97a, Beaumont 30 years later, by an affidavit filed in the record below (Defendant's Exhibit Q) confirmed his view that Warsaw covers the relationship involved in this case.

Respondent cannot resist inquiring how the Court below could be accused of having "overlooked" the statement of Giannini (petition, p. 26 n. 40) that the Court actually quoted *in extenso* (so as not to be mis-

leading, as is plaintiffs' truncated version) [28] and commented upon in detail and in context, 386 F.2d at 344, App. C, p. 97a:

> "Professor Giannini of Italy argued that the 'question consisted in seeing whether charter-parties should be introduced in air law . . . and *what should be the relationship between the owner and the operator.*' " [Emphasis supplied.]

Plaintiffs omitted the italicized portion, which shows what Giannini meant, and *at that,* accused the Court of "overlooking" the statement entirely!

D. Cogliolo's Conclusions Are Compatible With Those of Everyone Except Plaintiffs.

The Court of Appeals observed that the plaintiffs "emphasize certain selected statements of Cogliolo," 386 F.2d at 345, App. C, p. 99a, and plaintiffs allege that the Court of Appeals "took a very narrow and selective view of the plain import" of Cogliolo's writings (petition, p. 27).

The Court's observation is sound. The plaintiffs' charge is not. See 386 F.2d at 344-46, App. C, pp. 98a-102a, where the questions raised by Cogliolo, and his views, are fully explored by the Court.

Plaintiff's contention (petition, p. 28) that "the first five conclusions in Cogliolo's 1937 report . . . clearly demonstrate that the Warsaw Convention does not

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[28] In view of what previously has been said about plaintiffs' casual substitution of "charter" for "charterer", we observe that the quoted word "charterer" in the second full paragraph on page 26 of the petition is the word used by the Court of Appeals in the quoted sentence, 386 F.2d at 342, not "charters" as it is reproduced in Appendix C to the petition, p. 93a. See also note 13 above.

apply to charters" is groundless. It is based upon misunderstanding and confusion. It is the same confusion between the contract of hire (lease) and the contract of carriage to which respondent has already referred. Footnote 56 to the Court's opinion below sets out Cogliolo's report and all of his conclusions. He was concerned with the totality of "the rules of the contract for the hire of aircraft." Number 6 is the only one of his hypothetical situations focusing upon the contract of *carriage* providing for *international air transportation.* That situation described the relationship here involved (except that Cogliolo used cargo rather than passengers) and Cogliolo concluded that Warsaw was applicable to the carrier-patron relationship thus established. None of the other illustrations involved the incidents of liability arising out of *transportation.* Rather they were concerned with relationships and liabilities between the owner and the lessor *inter sese* (and to third parties) arising out of the "hiring" of aircraft; those supposititious cases had nothing to do with liabilities arising out of the contract of carriage, and therefore nothing to do with Warsaw. It is thus fair to say that Cogliolo concluded that Warsaw covered the relationship that arose out of the contract of carriage between Air France and the passengers on the flight in question in this case.

E. The "Six Efforts" To "Draft a New Convention" Do Not Detract From the Vitality of the Warsaw Convention.

No one has ever claimed that the Warsaw Convention covered all aspects of aircraft hire (lease) relationships. That is not the issue here as is shown by the rejection by the Courts below of the academic, abstract "issue" posed by plaintiffs' question: "does the Warsaw Convention apply to charters?"

The Warsaw Convention does apply to international air transportation, and it was properly held applicable here, because this case involves international air transportation.

If the Atlanta Art Association were a defendant, an entirely different question would be posed, but the answer of the Courts below has been properly limited to the question before them.

That subsequent attempts may have been made to deal with aspects of charter relationships, not involved here, is irrelevant. The issue is whether the admitted carrier-passenger relationship between Air France and the passengers on its aircraft in international air transportation on June 3, 1962, is governed by Warsaw.

To return to the airplane metaphor suggested above, respondent might put a new experimental distance-measuring device aboard its aircraft, without denying the reality of the standard radar or of the aircraft as a whole.

F. The Language and Structure of the Treaty Confirm the Rulings of the Courts Below.

The District Court held that the Warsaw Convention, by its plain language, applied to the transportation here involved. The Court of Appeals carefully considered the history and language of the Convention. The alleged "problem" presented by the fact that there is a "contract of hire" between the charterer and the carrier as well as the "contract of carriage" attested by the ticket between the carrier and the passenger (petition, p. 30), is illusory. 386 F.2d at 330-36, App. C, pp. 69a-80a. The carrier-passenger relationship is the same whether entered directly, or through the

agency of a go-between.[29] The Warsaw Convention applies to these suits, as the District Court and the Court of Appeals found.

G. The Record, as well as the Opinion of the Court of Appeals, is Replete with Expressions by the Experts Fully Sustaining the Decisions Below.

We reiterate that not one authority has ever stated that the Warsaw Convention is not applicable to voyage charter flights such as the one here involved. In addition to the references previously made to the statements of recognized experts, we invite the Court's attention to the similar views of other commentators, cited in the opinion of the Court of Appeals:

"The Warsaw Rules, Goedhuis states, apply to a wider extent to *voyage charter agreements*. . . . This carriage therefore comes under the convention." 386 F.2d at 349, n. 58, App. C at 108a. [Emphasis in original.] In his affidavit filed in the District Court, Defendant's Exhibit S, Goedhuis testified that "the Warsaw

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[29] That is the clear teaching of *Ross v. Pan American Airways, Inc.* 299 N.Y. 88, 85 N.E.2d 880 (1949); see opinion below, 386 F.2d at 352-53, App. C, p. 114a. See also *Egan v. Kollsman Instrument Co.*, — N.Y. —, 10 Avi. Cas. 17,651 (N.Y. Ct. App. 1967). There the New York Court of Appeals held that Warsaw governed the relationship between American Airlines and a passenger on the Chicago-New York leg of a New York-Vancouver-Chicago-New York trip where the original contract of carriage was made between Northwest Airlines and the passenger, and American accepted the passenger for the transportation specified in a ticket issued on Northwest ticket stock. The original contract of carriage was made by Northwest, and there was no "single definite contract" (*cf.*, petition, p. 30) between American and the passenger, but there was certainly a "contract of carriage" between American and the passenger; because American "consented" to transport the passenger, Warsaw was invoked. See quotation from 386 F.2d 334, App. C, p. 76a, at p. 8 above.

Convention would be applicable" to the case at hand. 386 F.2d at 349 n. 59, App. C, at 108a. Goedhuis is Professor of Air and Space Law at the University of Leyden, author of several books and articles on the Warsaw Convention and President of the Hague Conference.)

"For K. Grönfors, as for other commentators, there is no doubt that charter flights come within Warsaw." 386 F.2d at 350, App. C; pp. 110-11a. (Grönfors is the author of AIR CHARTER AND THE WARSAW CONVENTION (Stockholm 1956).)

Maniatopoulos is to the same effect: "*in the case of charter for a given journey, where the charterer will be using the aircraft exclusively for his own purposes, the Warsaw Convention has been considered as applying.* This Convention has therefore been considered as applying generally, . . ." 386 F.2d at 346, App. C, pp. 101a-02a. [Emphasis by the Court.] Maniatopoulos' views are particularly persuasive in opposition to plaintiffs' claims regarding subsequent efforts to amend Warsaw with respect to charters, for he was Rapporteur of the Third Commission, and the above-quoted language appears in his 1946 report on a proposed convention he drafted on "the hire and charter of aircraft". 386 F.2d at 346, App. C, p. 101a.

See also the Court of Appeals' discussion of Riese, "a German delegate to Warsaw," 386 F.2d at 348, App. C, pp. 106a-07a (see also RIESE, LUFTRECHT XIV-XV, § 42(3), pp. 406-09 (Stuttgart 1949), as quoted at pp. 91-92 of the defendant's December 22, 1964 brief in the Court of Appeals). See also the Court's treatment of Sundberg, 386 F.2d at 350, App. C, pp. 109a-10a.

In addition, we respectfully refer the Court to the views expressed by Rhyne (Chas. A. Rhyne, former President of the American Bar Association, former Chairman of the ABA Committee on Aeronautical Law, and author of numerous works on aviation law) in his AVIATION ACCIDENT LAW 257-58 (1947) (referred to at pp. 93-94 of our December 22, 1964 brief below.)

CONCLUSION

There is no merit in the Petition, and nothing is presented calling for review by this Court.

WHEREFORE, Respondent prays that the petition be denied.

Respectfully submitted,

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March 8, 1968

CERTIFICATE OF SERVICE

It is hereby certified that copies of the Brief for Respondent in Opposition to Petition for Certiorari have been served upon counsel for the petitioners in the foregoing matter by depositing the same in the United States mail, with adequate postage thereon, properly addressed to:

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This 8th day of March, 1968.

E. Smythe Gambrell

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1089

BATES BLOCK, ET AL., PETITIONER

v.

COMPAGNIE NATIONALE AIR FRANCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

1. This memorandum is submitted in response to the Court's order of March 25, 1968, inviting the Solicitor General to express the views of the United States.

The sole question in this case is whether the Warsaw Convention[1] applies to voyage charter flights.[2]

[1] Formally titled, "Convention for the Unification of Certain Rules Relating to International Transportation by Air," but commonly referred to by the name of the city in which it was concluded on October 12, 1929. It was adhered to by the United States in 1934, 49 Stat. 3000; T.S. No. 876.

[2] In a "voyage charter", as distinguished from a "bare-hull charter" or a "time charter", the owner of an aircraft—respondent in this case—charters the plane, with a full crew, for

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(App. 61a). Both the district court and the Court of Appeals for the Fifth Circuit held that it does apply to such flights and that, therefore, the carrier could invoke the limitation of liability provisions in the Convention. The court of appeals, after examining the terms of the Convention, its history, and the opinions of leading commentators, concluded:

> * * * The Warsaw Convention is based on the existence of a contract of carriage between the air carrier and the passenger. When a passenger is transported a contract of carriage exists whether or not the transportation is undertaken pursuant to an air charter. * * * Here Air France was the carrier. Air France assumed full contractual responsibility for the transportation of the passengers. In recognition of that responsibility Air France controlled the aircraft and operated it through an Air France crew. A passenger's right to be carried came into being only on the issuance and delivery of an individual ticket by Air France showing on its face the airline's obligation to perform the contract of transportation under the provisions of the Warsaw Convention. We hold therefore that the convention applied * * *. [App. 115a–116a].

2. The question has been examined by the Department of State, which of course has executive respon-

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a predefined route and destination, and retains operational control over the aircraft. See App. 67a–68a.

The power of the Civil Aeronautics Board to authorize supplemental air carriers to carry inclusive tour charters, which would be classified as voyage charters for these purposes, is before the Court in Nos. 800, 946, 969, *World Airways, Inc.* v. *Pan American World Airways, Inc.*

sibility for the interpretation of international agreements to which the United States is a party, by the Department of Transportation and by the General Counsel of the Civil Aeronautics Board. All are in agreement on the proposition that the courts below were clearly correct in their construction of the Convention. Moreover, in the government's view, the case does not present an issue of such recurring significance as to require plenary consideration by this Court.[3]

In light of the extensive analysis of the issues provided by Judge Wisdom's opinion for the court of appeals—a discussion which we regard as unexceptionable in all material respects—we do not undertake to duplicate in detail the reasons for the government's position. We believe that the fatal flight involved in this case was "international transportation" within the compass of Article 1(1) of the Convention (App. 2a), as defined in Article 1(2) (App. 2a). We find no support for the contention that air charters have been generally and categorically excluded from coverage by the Convention, either in the text of its provisions or in the deliberations leading to its promulgation. For the reasons stated by the court below (App. 91a, 105a–116a), we submit that the owner of

[3] There are no other reported decisions dealing with this precise problem. Moreover, on May 13, 1966, by Special Agreement among foreign and domestic air carriers, the limit of international air carrier liability for passenger injuries was increased to $75,000 per person on transportation to, from, or with an agreed stopping place in the United States. C.A.B. Agreement No. 18,900 (Order Serial No. E–23680, 31 Fed. Reg. 7302, 3 CCH Av. L. Rep. ¶ 27,130). Many air carriers also have similar guarantees in their filed tariffs.

an aircraft (typically, an airline, and in this case the respondent) is—in a voyage charter situation—the "carrier" within the meaning of Article 22(1) (App. 15a) and accordingly entitled to limit its liability for personal injuries arising out of the carriage of passengers in international transportation.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1968.

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COMPAGNIE NATIONALE AIR FRANCE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO MEMORANDUM SUBMITTED BY THE SOLICITOR GENERAL AS *AMICUS CURIAE*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO MEMORANDUM SUBMITTED BY THE SOLICITOR GENERAL AS *AMICUS CURIAE*

This brief is submitted in reply to the memorandum submitted by the Solicitor General.

The Solicitor General states "in the government's view, the case does not present an issue of such recurring significance as to require plenary consideration by this Court," citing the fact that "there are no other reported decisions dealing with this precise problem," and suggesting that the recent Special Agreement among airlines raising the limit to $75,000 renders the issue moot.[1]

[1] Solicitor General's Brief, page 3.

The issue raised by the petition is significant. A large and growing segment of international flying is comprised of charters. Statistics released six days after the filing of the petition for certiorari, show that in 1967 charter flying constituted 17 per cent of all transatlantic air passenger travel. From April through September, 1967, 556,814 charter passengers crossed the Atlantic, an increase of approximately twenty-one per cent over the preceding year.[2] Nothing indicates the explosive growth of charter flying will cease.

It is true that no reported decision deals with this precise problem.[3] The issue has never before been raised. Its importance, however is not measured by how many times it has been dealt with. Until this consolidated action involving sixty-two deaths plaintiffs have not been able to raise the question because the effort has been too great for their resources. Now the work has been done; the issue is of growing significance. It should be resolved with that finality which only this Court can impart.

Furthermore, the recent Special Agreement among airlines providing a $75,000 limitation, relied on by the Solicitor General, does not render the question of inclusion of charters within the Warsaw Convention moot. Before the Special Agreement can even apply, it must first be deter-

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[2] Release, CAB-68-9, 382-6031, dated February 12, 1968. Transatlantic charter traffic has grown from 6.5 per cent in 1958 to 17.0 per cent in 1967, a 260 per cent growth in 10 years.

[3] The issue existed but remained unexplored in several cases cited in respondent's brief in opposition to this petition. (*Demanes* v. *Flying Tiger Line, Inc.*, 10 Avi. 17,611 (N. D. Calif. 1967); *Glassman* v. *Flying Tiger Line, Inc.*, 9 Avi. Cas. 18,295 (N. D. Calif. 1966); *Warren* v. *Flying Tiger Line, Inc.*, 234 F. Supp. 223 (S. D. Calif. 1964), *rev'd on other grounds*, 352 F. 2d 494 (9th Cir. 1965); *Mertens* v. *Flying Tiger Line, Inc.*, 35 F.R.D. 196 (S.D.N.Y. 1963), *aff'd*, 341 F. 2d 851 (2d Cir.) *cert. denied*, 382 U. S. 816 (1965), *Flying Tiger Line* v. *United States*, 170 F. Supp. 422 (Ct. Claims 1959). Respondent's brief, pages 11-12.)

mined that the Convention itself governs.[4] The Agreement, therefore, perpetuates the question.

The issue presented by the petition, therefore, is of great and grave importance not only to the families of the 62 decedents herein, whose rights to fair damages may be destroyed by this archaic treaty, but also to the many passengers in the future who, if the Convention covers charter flights, will be damaged by it.

Furthermore, notwithstanding the facile ratification of the Solicitor General, the decision of the Court of Appeals is wrong, and plainly so. As pointed out in our petition the Court of Appeals had to abandon well-accepted tenets

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[4] The air carriers' agreement to abide by the $75,000 limitation was entered into under Article 22(1) of the Warsaw Convention. A typical tariff reveals that the new limitation has as its basis the Convention:

"RULE 18: LIMITATION OF LIABILITY

(D)(1)(a) The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place (i) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs." Passenger Rules Tariff No. RR-3

of treaty construction and resort to concepts of French civil law to include charters in a convention whose drafters intended not to do so.

Unlike its active participation in *Alitalia-Linee Aeree Italiane, S.p.A.* v. *Lisi*, No. 70, also involving the Warsaw Convention and recently decided by this Court, the International Air Transport Association (IATA) has not been heard from here.[5] But reports to its member airlines, particularly by its Legal Committee, might serve as a brief *amicus curiae*, in favor of plenary consideration by this Court. IATA has continuously cautioned its airlines on the "gaps" or "ambiguities" of the Convention concerning charters and it, or its predecessor, has urged them, from the time of the Convention to virtually the present day, to give charter relationships the form and appearance of individual transportation, in an artificial attempt to bring charter relationships within the Convention's scope.[6]

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[5] On May 20, 1968, this Court granted leave to IATA to file a brief *amicus curiae*, in *Lisi*, on Alitalia's motion for a rehearing. IATA also filed briefs, *amicus curiae*, in *Lisi*, on the petition for a writ of certiorari therein, and on the merits.

[6] See, most recently the 1966 IATA Legal Committee Report urging the issuance of special tickets to charter passengers, IATA Bulletin No. 34, 1966, p. 82. See also the 1932 IATA Questionnaire, 17 IATA Inf. Bull. 42 (Hague 1932) discussed in the petition for a writ of certiorari pp. 24-26. See also ICAO Documents 7921-LC/143-1, p. 65, and 7921-LC/142-2, p. 69, contained in SJX 14 and reporting IATA reports and recommendations in 1957 and 1960.

CONCLUSION

This important question, under this important treaty merits consideration by this Court. The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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